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In The
Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a holder in due course of a Treasury check is entitled to recovery where the Treasury has acted in a manner that is contrary to commercial practices to which it is obligated to conform as modified by Treasury regulations and that would undermine the normal processes for the negotiation of Treasury checks and make Treasury checks unreliable.

2. Whether the Federal Circuit's refusal to consider Petitioner's argument that it stands in the shoes of its agent Norwest Bank because Petitioner did not specifically plead this legal theory in its complaint, creating a new pleading requirement, violated the longstanding liberal pleading requirements on a motion to dismiss established by this Court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Casa de Cambio Comdiv S.A. de C.V. ("Casa") was an international currency exchange company incorporated under the laws of Mexico. Casa has no parent corporations or non-wholly owned subsidiaries. No publicly held company owns 10 percent or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra*) is reported at 291 F.3d 1356 (Fed. Cir. 2002) ("Federal Circuit Opinion"). The opinion of the Court of Federal Claims (Appendix, *infra*) is reported at 48 Fed. Cl. 137 (2000) ("CFC Opinion").

BASIS FOR JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The decision of the U.S. Court of Appeals for the Federal Circuit of which Petitioner seeks review was entered on May 29, 2002. Casa filed a petition for rehearing *en banc* with the Federal Circuit on July 15, 2002, which was denied on August 7, 2002 (Appendix, *infra*).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be... deprived of property without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST Amendment Article V.

The relevant provisions of Tucker Act provide in part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1).

The relevant provisions of the regulations of the U.S. Treasury are set forth in the Appendix.

STATEMENT

This case raises questions of national and international importance relating to the negotiability of Treasury checks and the application of Treasury regulations, 31 C.F.R. Part 240, entitled "Endorsement and Payment of Checks Drawn on the United States Treasury" ("Part 240"), the interpretation of the Tucker Act, 28 U.S.C. § 1491(a)(1), the application of the Due Process and Takings Clauses of the Fifth Amendment of U.S. Constitution and the adoption by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") of a new requirement on a motion to dismiss that legal theories be specifically pleaded in complaints.

Until the October 2000 decision of the U.S. Court of Federal Claims ("CFC") in this case, the banking and business community understood, as this Court stated in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("*Clearfield Trust*"), that "The United States as drawee of commercial paper stands in no different light than any other drawee." In accordance with this principle, in *ABN Amro Bank N.V. v. United States*, 34 Fed. Cl. 126 (1995) ("*ABN Amro*"), the Treasury - pursuant to its regulations - was held subject to recovery by a holder in due course of a forged treasury check after the expiration of a reasonable time to examine the check and to refuse payment. Judge Andewelt in *ABN Amro* made an exhaustive analysis of the history of Treasury regulations and law of negotiable instruments in ruling that the Treasury could be held liable.

Ten days after his decision the Treasury sought to revise Part 240 to shift the risk of loss for forged Treasury checks from the government. *See* 60 Fed. Reg. 48,940 (Sept. 21, 1995). This proposed revision was not adopted in view of the opposition of the American Bankers Association, Bank of America, Chicago Clearing House, Citibank N.A., Florida International Bankers Association, Inc., and New York Clearing

House, among others. [1] The Treasury again tried and failed to amend Part 240 a few years later to give the Treasury additional time (150 days) for first examination. *See* 62 Fed. Reg. 29, 314 (May 30, 1997). [2]

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[1] When several parties offered comments on this proposed revision to the Treasury regulations, many stated that the proposed revision represented a drastic departure from established precedent, viz., that the risk of loss resulting from a forged drawer's signature or counterfeit check has been placed squarely upon the drawee. *See, e.g.*, Florida International Bankers Association, Inc. ("FIBA"), *Comment Upon Proposed Rule Revising 31 C.F.R. Part 240*, November 27, 1995 ("FIBA views [the proposed rule change] as an attempt by Treasury to arbitrarily, capriciously and unlawfully overturn long-standing precedent governing the rights and obligations of parties to commercial instruments in a way which would simultaneously shield and promote delay and incompetence in the processing of Treasury checks"); New York Clearing House, *Endorsement and Payment of Checks Drawn on the United States Treasury – Proposed Rule*, November 6, 1995 ("this proposed revision takes care of Treasury's problem in *ABN Amro v. United States* but it turns case law and the U.C.C. on their heads. It overturns *Price v. Neal* and U.C.C. § 3-418 by shifting the loss from a counterfeit check away from Treasury, which is in the best position to determine the authenticity of the drawer's signature, to the private sector collecting banks, which have no ability to determine the authenticity of the signature").

[2] *See, e.g.*, First Tennessee National Corporation, *Proposed Rule 31 C.F.R. Part 240*, July 26, 1997 ("we oppose the adoption of Treasury's proposal to radically rewrite the check payment system rules so as to shift losses from Treasury to innocent banks"); California Credit Union League, *Endorsement and Payment of Checks Drawn on U.S. Treasury*, July 29, 1997 ("Treasury should abide by the same rules and regulations that every other financial institution must comply with regarding the return of unpaid items"); New York Clearing House, *Endorsement and Payment of Checks Drawn on the United States Treasury – Proposed Rule*, July 29, 1997 ("we strongly believe that the proposed revisions to 31 C.F.R. 240 conflict with longstanding common law decisions and the Uniform Commercial Code and would unfairly benefit Treasury at the expense of private sector banks").

The CFC in this case nevertheless rejected the conclusion reached in *ABN Amro* in dismissing Casa's complaint. CFC Opinion, 48 Fed.Cir. at 146-47. The Federal Circuit, in affirming the CFC, stated in a footnote that *ABN Amro* was not binding on it. The Federal Circuit decided that the depositor, although a holder in due course, was not entitled to recover because the court limited the application of *Clearfield Trust* and its requirement that the Treasury comply with well-recognized commercial banking principles to the Treasury's dealings with presenting banks and did not recognize the distinction between a forged drawee's signature and a forged endorsement. On this basis, it ruled that Treasury Regulations are not money-mandating as to depositors. It is also held that the Treasury's debit to a depositor's bank did not have a direct and substantial impact on the depositor, disagreeing with the Second Circuit and agreeing with the Third, Tenth and Ninth Circuits.

These questions are of critical importance to the innumerable businesses, both domestic and foreign, that negotiate Treasury checks and that depend on the Treasury to comply with the generally applicable rules of commercial banking when the Treasury is acting in its role as a commercial banker. The Treasury has been granted some flexibility in light of its status as a governmental entity and the Treasury has in fact enacted regulations which modify some of the normal rules of commercial banking. However, within the parameters of these modifications as codified in the regulations, the commercial banking world depends on the Treasury's compliance with the widely-recognized rules that govern commercial banking.

Among these rules are those that protect holders in due course. The commercial banking world has long operated on the principle, dating back over 200 years, that where a forged check is mistakenly paid by the issuing bank, the risk of loss for the payment falls on the issuing bank and not the holder of the check. The principle is based on the point that in the processing of negotiable instruments, where time is of the essence, the drawee bank is in a superior position to determine the genuineness of the check. Commercial banks thus operate on the "midnight deadline" rule, which, as modified by Treasury regulations, requires the Treasury to complete its first examination of a check and to accept or decline final payment within a reasonable time. In this case the Federal Circuit essentially condoned the Treasury's violations of both of these fundamental rules.

This case also presents a fundamental issue regarding the requirements for pleading under the rules that govern practice in the federal trial courts. This Court has long held that the pleading requirements are to be construed very liberally, particularly in the context of a motion to dismiss a complaint. Despite these established principles, the Federal Circuit adopted a new requirement and refused to consider a key argument presented by Casa because Casa had purportedly failed to plead this legal theory in its complaint.

The Court should grant the petition to correct these fundamental departures from this Court's prior decisions.

A. Regulatory Scheme

Part 240 sets forth the procedures which the Treasury must follow (1) to decline final payment on a Treasury check for which provisional payment has been made subject to examination by the Treasury ("Declination") or (2) to reclaim a final payment under limited circumstances ("Reclamation").

1. Declination

Like commercial banks, the Treasury has a certain period within which to conduct its first examination of a check to determine whether the provisional payment of the check should become final. Under the Uniform Commercial Code ("U.C.C."), which codified common law and has been adopted in some form by each state, commercial banks are subject to the "midnight deadline" rule which requires that a paying bank's first examination be completed by midnight of the first business day after presentment of a check for payment. *See* U.C.C. §§ 4-301(1); 4-213(1)(d). The Treasury has modified the midnight deadline rule to extend its time for examination in Part 240 as follows:

> The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a *reasonable time* to make such examination.

31 C.F.R. § 240.3(c) (2001) (emphasis added). This provision, similar to the midnight deadline rule for

banks, is designed to implement finality with regard to the payment of Treasury checks.

2. Reclamation

If final payment has been made on a Treasury check, the Treasury might, but did not in this case, attempt to reclaim the payment from the presenting bank on checks which:

> (1) bear a forged or unauthorized endorsement; or (2) contain any other material defect or alteration which was not discovered upon first examination.

31 C.F.R. § 240.6(a) (2001). Moreover, Part 240 sets forth an extensive procedure of notice and an opportunity to protest before the Treasury may reclaim payment on a check as described above. 31 C.F.R. § 240.7 (2001). This provides an appropriate procedure with respect to endorsements and alterations in accord with commercial practices.

B. The Forged Check and Treasury's Violation of Its Regulations

Casa was an international currency exchange, had its principal place of business in Mexico City and is incorporated under the laws of Mexico. Respondent United States ("Respondent") took part in the events at issue in this action through the Department of the Treasury, an executive department of the executive branch of government ("Treasury").

On or about October 29, 1993, Genaro Alvarez ("Alvarez") presented to Casa a check drawn on the Treasury in the amount of $1,165,000 (the "Check"). The Check was made out to Alvarez as payee and he endorsed it. Casa gave value for the Check and forwarded it to Norwest Bank, Minnesota-N.A. ("Norwest"), Casa's U.S. banker, for deposit and collection. On November 1, 1993, Norwest, as Casa's agent, forwarded the Check to the Federal Reserve Bank of Minnesota ("FRB-M") for collection. On November 4, 1993, the FRB-M debited the Treasury's unclassified account and gave immediate credit for the Check to Norwest. On November 5, 1993, Casa verified that the funds had been collected and were available in its account at Norwest.

On November 3, 1993, the check was visually inspected and its invalidity, including inferentially the forging of the drawee's signature, was apparent to the Treasury. As is the Treasury's customary practice, on November 8, 1993, the agency issued a report on the group of checks submitted by the FRB-M which included the Check. The Check was not referenced in the report, indicating that the Treasury had not decided to decline payment of the Check.

On or about November 17, 1993, the Treasury was informed that a number of checks had been stolen from the U.S. Postal Data Service Center in St. Louis, Missouri. One of the stolen checks bore the same serial number as the Check paid by the Treasury on November 4, 1993. Even though the Treasury knew at least as early as November 17, 1993 that the Check was invalid, at no time did the Treasury act inconsistently with the understanding of all parties in the collection chain that the Check had been processed to final payment. Indeed, the Treasury never returned the Check, nor did the Treasury reject payment on the Check prior to final payment pursuant to the Treasury's regulations.

On February 1, 1994 - approximately three months after the Check was presented and paid - the Treasury ordered the FRB-M to credit the full amount of the Check to its account. The Treasury took this action well after the reasonable time granted by the relevant regulations for declination had passed. As ordered, the FRB-M credited the Treasury's account, and debited Norwest's account, for the full amount of the Check. Norwest, in turn, debited the full amount of the Check to Casa's account. Casa alleged that its direct damages include the full amount of the Check, $1,165,000, from which the inference to be drawn is that Casa reimbursed Norwest for the full amount of the debt.

C. Procedural History

Casa filed a complaint in the CFC on October 29, 1999. The court had jurisdiction to hear the case pursuant to 28 U.S.C. § 1491. The complaint asserted three claims. Count I sought relief based upon the Treasury's violation of the Part 240 regulations which govern the examination and payment of United States government checks. Count II set forth a claim for illegal exaction in which Casa alleged that the United States obtained Casa's money illegally and should be required to return it. Count III, in the alternative, sought relief under the Takings Clause of the Fifth Amendment to the United States Constitution, and alleged that the United States took Casa's property without the payment of just compensation.

On March 31, 2000, pursuant to Rules 12(b)(1) and 12(b)(4) of the Rules of the Court of Federal Claims, Respondent moved to dismiss the complaint. In its opinion dated October 27, 2000, the CFC dismissed Casa's regulatory violation and takings claims (Counts I and III) for lack of jurisdiction and dismissed Casa's illegal exaction claim (Count II) for failure to state a claim.

Casa appealed the trial court's decision to the Federal Circuit, which on May 29, 2002, affirmed the decision of CFC. The Federal Circuit, misapplying this Court's decision in *Clearfield Trust*, held that Casa had no recourse against the Treasury for the forged check. The Federal Circuit held that, even if the Treasury had violated its own regulations in purporting to decline payment on the check some three months after the check was first presented for payment, Casa was not entitled to compensation for that violation. Moreover,

the Federal Circuit refused to consider Casa's argument that it was subrogated to the claims of its agent, Norwest, because "no mention of this theory appears in Casa's complaint."

Casa now petitions this Court for writ of certiorari to review the decision of the Federal Circuit.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for at least two fundamental reasons. First, this Court should settle an important question of federal law which can affect everyone who negotiates Treasury checks - is a holder in due course of a Treasury check entitled to recovery, where the Treasury has violated its own regulations in purporting to decline payment on a forged check well after the reasonable time allowed for first examination of the check. Second, to correct a manifest injustice and prevent its future application, this Court should turn back the Federal Circuit's departure from this Court's precedents mandating liberal pleading standards on a motion to dismiss a complaint.

The proper application of the rules that govern the dealings of the private sector when negotiating Treasury checks is of critical importance. The Federal Circuit misapprehended the basic principles laid down by this Court, treating this case as if it involved a forged endorsement. However, existing federal law, codified in the Treasury's Part 240 regulations and the commercial law of negotiable instruments, U.C.C. §§ 3-418, 4-301, make a critical distinction between forged checks and forged endorsements on checks. Under these regulations, when a forged check is presented,

the drawee is afforded a brief and limited amount of time to decide whether or not the signature of its drawer is genuine and the check should be returned, after which time the payment becomes final if the check has not been rejected. U.C.C. § 4-302.

This Court's precedents establish that, when acting as a banker, the United States is generally subject to the laws that govern commercial banking. This Court's holdings in *United States v. Nat'l Exch. Bank of Balt., Md.*, 270 U.S. 527, 534-35 (1926) ("*Nat'l Exch. Bank*"), and *Clearfield Trust*, 318 U.S. at 369, firmly establish this principle. As such, these precedents indicate that the Treasury should be required, when acting in a commercial capacity, to observe the same basic rules that apply to other actors in the commercial marketplace. In this capacity, it acts without sovereign immunity. This Court should clarify - and confirm the expectations of the business world - that its own precedents and existing federal regulations require the Treasury to abide by the basic rules of the marketplace.

Moreover, in applying the Fifth Amendment and the Tucker Act, the Federal Circuit ruled, as a matter of law, that the debit to the account of a depositor by a presenting bank because of the Treasury's order to debit the presenting bank is not a direct and substantial result of the Treasury's order. In so ruling it expressed its disagreement with the Second Circuit and its agreement with the Third, Tenth and Ninth Circuits, without permitting the development of the facts of this case. This Court should resolve this split of the circuits on this important question of federal law.

The Court should also grant the petition in order to remedy the failure of the Federal Circuit to comply

with the liberal pleading standards established by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("*Conley*"), and subsequent cases. The Federal Circuit ignored these precedents and did not even refer to this liberal pleading rule, instead holding that Casa had waived any argument based on the legal theory that Casa stepped into Norwest's shoes because this theory was not mentioned in Casa's complaint. However, under this Court's liberal pleading rules, a plaintiff is not required to plead specific legal theories, but is only required to provide the defendant with general notice of its claims.

I. THIS COURT MUST SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE RIGHTS OF HOLDERS IN DUE COURSE OF TREASURY CHECKS.

The Federal Circuit's ruling changed the law, cutting off the rights of holders in due course of Treasury checks. It did so by circumscribing this Court's precedents and limiting their application to presenting banks. The ruling raises a question of international, as well as national, importance, affecting anyone in any part of the world who negotiates Treasury checks. This question is one that can only be clarified and settled by this Court.

A. This Court's Precedents Establish That the Treasury Must Abide By Longstanding Commercial Banking Rules Which Protect Holders In Due Course.

In its analysis, the Federal Circuit misapprehended several fundamental principles applicable to this case that provide the foundations for longstanding commercial banking practices. First, the court assumed incorrectly that the check here bore a forged endorsement, whereas in fact it was a forged check stolen from the United States that bore a correct endorsement. Federal law, codified in the Treasury's Part 240 regulations and the commercial law of negotiable instruments, U.C.C. §§ 3-418, 4-301, treat forged check and forged endorsement situations differently. Under applicable law, when a forged check is presented, the drawee is afforded a brief and limited amount of time to decide whether or not the signature of its drawer is genuine and the check should be returned, after which time the payment becomes final if the check has not been rejected. U.C.C. § 4-302. By contrast, when a check with a forged endorsement is presented, the drawee has no way of knowing whether the endorsement is genuine unless and until notified by the payee. Thus, payment on a check with a forged endorsement is not subject to the final payment rule and chargebacks can be made at a later time. In this case, federal law, as codified in Part 240, mandates that the final payment rule apply, because this case involves a forged check and not a forged endorsement.

The final payment rule is implemented through the "midnight deadline" rule to which commercial

banks are subject, which requires that a drawee bank's first examination be completed by midnight of the first business day after presentment of a check for payment. *See, e.g.*, U.C.C. §§ 4-213(1)(d), 4-301(1). The Part 240 regulations grant the Treasury more time than commercial banks to examine checks and decline payment. 31 C.F.R. § 240.3(c). However, the Part 240 regulations do not allow the Treasury to decline payment on a check once a "reasonable time" has passed. These regulations protect the banking community and the public from arbitrary or overreaching actions by the Treasury, and the proper interpretation of these regulations is therefore of exceptional importance to everyone who negotiates Treasury checks, including depositors of presenting banks.

Nevertheless, the Federal Circuit declined to provide any relief to Casa for the Treasury's failure to conduct its first examination of the check in question within a reasonable time, holding that the regulations in Part 240 are "not money-mandating as to Casa since there is no indication that they were designed to convey rights on depositors of presenting banks." Federal Circuit Opinion, 291 F.3d at 1361. In so holding, the court failed to comply with the precedents of this Court and Part 240, which establish a consistency of treatment for all actors in the commercial marketplace. Indeed, this Court has long held that "the United States does business on business terms." *Nat'l Exch. Bank*, 270 U.S. at 534. The federal government "is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person

would leave no room for doubt.'" *Clearfield Trust*, 318 U.S. at 369 (*citing Nat'l Exch. Bank*, 270 U.S. at 535).

This concept of an equal playing field, clearly established by this Court's precedents, also informs any reading of Part 240. The commercial banking world has long observed the basic rule that where a forged check is mistakenly paid by a drawee bank, the risk of loss for the payment falls on the drawee bank and not the holder of the check. *Price v. Neal*, 97 Eng. Rep. 871 (1762). This Court's precedents requiring equal treatment for all players in the commercial marketplace means that the Treasury must accept responsibility for the consequences of its actions.

Indeed, Section 240.3 can be said to be, as Judge Cardozo stated, "instinct with obligation." *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917). As this Court reiterated in *United States v. Tex.*, 507 U.S. 529, 534 (1993) "[C]ourts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident" (brackets in original) (*citing Astona Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). Also in this case, the Treasury's failure to decline payment on a check within a reasonable time of first examination as provided in Part 240 can be fairly imputed to include payment of the amount of the check if the declination is unreasonably late. This Court should therefore apply its own precedents and 31 C.F.R. § 240.3 by requiring the Treasury to abide by the same rules as other players in the commercial marketplace and accept the consequences of its failure to decline the Check in a reasonable time, namely through payment to Casa.

The Treasury has recognized its liability to holders in due course under the existing Treasury regulations and has in fact made efforts to amend its regulations to eviscerate its obligations. For example, ten days after the court in *ABN Amro* decided that Part 240 did not immunize the Treasury against the losses of the holder, (where, as here, the check was forged), the Treasury sought to revise Part 240 to shift the risk of loss from the government. *See* 60 Fed. Reg. 48,940 (Sept. 21, 1995). When the Treasury again tried, and failed, to amend Part 240 in 1997, *see* 62 Fed. Reg. 29,314 (May 30, 1997), it faced similar criticism. These repeated attempts to amend Part 240 to expand the Treasury's defenses as a drawee demonstrate that the Treasury regards the existing regulations as a basis for liability to the holder of the check.[3] Petitioner placed great reliance on *ABN Amro* in its arguments and briefs in the Court of Federal Claims and the Federal Circuit. The misapplication of this Court's precedents and these regulations by the Federal Circuit raises a question of exceptional importance that this Court should now address.

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[3] *See* 1 Barkley Clark and Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards*, ¶10.10 [1] (Rev. Ed. 2002 Update No. 2) This treatise also explained the history of the Treasury regulations as follows: "The Treasury regulations can be best understood against the background of case law out of which they arose. Independent of the UCC, the United States Supreme Court has consistently applied the rule of *Price v. Neal* to Treasury checks. The line of cases runs from *Bank of U.S. v. Bank of Ga.*, [23 U.S. 333 (1825)], to *Cooke v. United States*, [91 U.S. 389 (1875)], to *United States v. Chase Nat'l Bank*, [252 U.S. 485 (1920)]. *Id.* § 10.10[2] at page 10-191 (footnotes omitted).

B. The Part 240 Regulations Do Not Exclude Casa, the Bearer of the Loss.

In light of the fundamental principles of commercial banking recognized by this Court as applying to the Treasury, Casa must be viewed as being within the ambit of the protections afforded by the Treasury's Part 240 regulations. Nevertheless, relying on *Clearfield Trust*, the Federal Circuit reasoned that "where a check has been stolen and the payee's endorsement has been added or forged, the dispute is between the Treasury and the bank that presented the check for payment." Federal Circuit Opinion, 291 Fed. 3d at 1359. Applying this analysis, the court concluded that any dispute in this case must be between the Treasury and Norwest (the presenting bank), but not between the Treasury and Casa. *See id.* ("[I]t is indeed difficult to believe that, where a debit has occurred, making affirmative legal action by the United States unnecessary, the presenting bank (here, Norwest) is without legal recourse against the United States."). Accordingly, the court held that the Treasury regulations "are not money-mandating as to Casa since there is no indication that they were designed to convey rights on depositors of presenting banks." *Id.* at 1361.

However, this case does not involve an incorrect endorsement and Casa made Norwest Bank its agent whole as it was required to do under the U.C.C. as adopted in Minn. Stat. § 336.4-207(a)(2) and (e). Accordingly, Norwest was not damaged and the loss caused by the Treasury's debit to Norwest's account was Casa's loss.

Petitioner had alleged in Count I of the Complaint in this action that Treasury violated 31 C.F.R. section 240.3(c), which provides that:

> [t]he Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a *reasonable time* to make such examination.

Fed. Cir. Opinion 291 F.3d at 1360 (emphasis added). The three months that the Treasury took to reverse payment of the Check here was long past the reasonable time for final payment. The payment to Casa's account was final and the funds were Casa's long before the reversal by the Treasury. *See* 31 C.F.R. § 240.3(d) ("Checks shall be deemed to be paid by the United States Treasury only after first examination has been fully completed."). Once final payment was made, the Treasury's only recourse was to seek recovery of the payment through the reclamation procedure set forth in 31 C.F.R. section 240.6. The Treasury did not avail itself of this procedure, however, because it was inapplicable and, instead, violated its own regulations in asserting a declination to reach into Casa's account for repayment.

In this case, the substantive claim in Count I is based on the fact that the regulation at issue can be fairly interpreted as mandating compensation by the United States for the damages sustained. *See, e.g., Hamlet v. United States*, 873 F.2d 1414, 1416-17 (Fed. Cir. 1989).

The law has been clear for decades that the standard for determining whether a statute or regulation is money mandating is broad:

> [w]here an Act of Congress or an executive regulation *arguably confers* [the right to money damages] upon the claimant, the court will assume jurisdiction and decide his case on the merits, even though the defendant may ultimately prevail.

Ralston Steel Corp. v. United States, 340 F.2d 663, 667-68 (Ct. Cl. 1965), *cert. denied*, 381 U.S. 950 (1965) (internal citations omitted) (emphasis added). Despite this lenient standard, the Federal Circuit held that the regulations in Part 240 are not money mandating as to Casa. As a result, it dismissed Count I of Casa's complaint for lack of jurisdiction.

However, the Treasury's liability under these precedents and Part 240 must be viewed as running to the party that incurred the loss, in this case Casa. In accord with commercial practices and the U.C.C. as adopted in Minn. Stat. § 336.4-207(a)(2) and (c), Casa warranted to Norwest that all signatures on the check were genuine and Norwest as its agent was entitled to indemnification for the debit to its account ordered by the Treasury. Under this Court's precedents and Part 240, there is no basis for concluding that the Treasury's obligation to provide compensation for a violation of its regulations is limited to a presenting bank, especially one that has been made whole by its depositor, and the Federal Circuit did not cite any

authority for this proposition, which is contrary to established commercial practices and law.

Moreover, the Treasury's regulations concerning reclamations - which under the ruling of the Federal Circuit, should have been, but were not followed in this case - refer to reclamation from the "presenting bank or any other indorser," 31 C.F.R. § 240.7(a), clearly indicating that the Treasury's obligations under the regulations, just as those of other drawees, are not limited to presenting banks.

C. The Federal Circuit's Ruling On Causation Is Part of a Conflict Among the Circuits and Disregards the Facts of this Case.

The Federal Circuit's ruling also continued a split among the circuits on the important question of federal law, viz., the extent to which actions of the Treasury that directly impact depositors through a direct and foreseeable chain of causation give rise to liability on the part of the Treasury for such actions. The Federal Circuit's conclusion that, as a matter of law, there was no direct and substantial impact upon Casa of the Treasury's debit of Norwest for purposes of the Due Process and Takings Clauses of Fifth Amendment raise an important question to all who may be subjected to the Treasury's unilateral and possibly arbitrary and unlawful action in debiting their depository banks.

At least one circuit has clearly recognized that the Treasury must accept the consequences of its actions where it acts with full knowledge of what those consequences will be. The Second Circuit in *Breault v. Heckler*, 763 F.2d 62, 64 (2nd Cir. 1985), wrote:

> When the Treasury Department insists upon payment by a depository bank, it does so with full awareness of the course of conduct that the bank subsequently will pursue. . . In short, the Treasury Department knows that, when it demands payment from a bank because of an allegedly unlawful deposit, the bank will be duty bound to debit the amount of the payment against the account involved so as "to protect itself from loss in responding to the Government's collection action." (citation omitted).

The court therefore held that the federal government violated the Due Process rights of the depositor in recouping money from the depository bank. The Federal Circuit rejected this conclusion while acknowledging a conflict between circuit courts of appeal, stating "We agree with the Third, Tenth and Ninth Circuits, and disagree with the Second Circuit." Federal Circuit Opinion, 291 F.3d at 1366. The decisions of the other circuits referred to are *Alnor Check Cashing v. Katz*, 11 F.3d 27 (3rd Cir. 1993) (involving a forged endorsement and not a forged check); *Dockstader v. Miller*, 719 F.2d 327 (10th Cir. 1983) (involving an inadvertent deposit of a social security

check issued to a deceased spouse); and *Powderly v. Schweiker*, 704 F.2d 1092 (9th Cir. 1983) (also involving the deposit of social security checks issued to a deceased spouse). This Court should resolve this longstanding conflict among the Circuits regarding the extent to which federal agencies such as the Treasury are responsible for the direct consequences of their actions.

In short, this Court should address the foregoing questions because the Federal Circuit misapprehended this Court's precedents, the Treasury's regulations regarding compensation of those who suffer losses as a result of the Treasury's violations of its own rules of conduct, and the consequences of the Treasury's unilateral actions and in doing so raised questions of exceptional importance concerning the Due Process and Takings Clauses of the Fifth Amendment.

II. THE REQUIREMENT OF PLEADING LEGAL THEORIES TO SUSTAIN A COMPLAINT IS INCONSISTENT WITH THE LIBERAL INTERPRETATION TO WHICH CASA WAS ENTITLED ON A MOTION TO DISMISS.

This Court should also grant the petition because the Federal Circuit adopted a new pleading rule in derogation of this Court's precedents concerning pleading standards on a motion to dismiss. The Federal Circuit held that it need not address Casa's argument that it is entitled to pursue the claims that Norwest as its agent would have against the United States. The court stated that "[n]o mention of this [agency] theory appears in Casa's complaint" and

ruled that Casa had therefore waived any claims that it might have on that basis. Federal Circuit Opinion, 291 F.3d at 1366.

There can be little doubt that Casa would in fact be entitled to pursue any claims that Norwest might have against the Treasury because any actions taken by the Treasury against Norwest were really actions taken against Casa. According to Section 336.4-207(a)(2) of the Minnesota Statutes, Casa warranted to Norwest that all signatures on the check in question were authentic. This warranty was breached because the check was forged and Casa was liable to Norwest for its damages under Section 336.4-207(a)(2). Moreover, pursuant to U.C.C. Section 4-207, a bank always retains the right to assert a claim against its customer for breach of the transfer warranty which accompanied the check. *See, e.g., Sun Bank, N.A. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 637 So. 2d 279, 282-83 (Fla. Dist. Ct. App. 1994). Thus, when the Treasury ordered the debit of the check, the debit was posted to Norwest's account, but it was actually a loss imposed on and borne by Casa. Therefore, as principal and payer of the debit, Casa is subrogated to the claims of Norwest and should be entitled to maintain those claims against the United States.

However, the Federal Circuit denied Casa this right because of its purported failure to specifically plead an agency theory in the complaint. In so holding, the court ignored the argument set forth by Casa in its brief regarding the proper standard for ruling on a motion to dismiss. In its briefs, Casa set forth the well-established rule, based on clear

precedents of this Court, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley*, 355 U.S. at 45-46. As the *Conley* Court concluded, "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47 (citing Fed. R. Civ. P. 8(a)(2)).

This Court has re-affirmed the *Conley* standard on a number of occasions. *See, e.g., Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992, 998 (2002) ("a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'") (citations omitted); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (holding that a complaint will not be dismissed because "on this complaint, we cannot say 'beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief'" (citing *Conley*, 355 U.S. at 45-46)); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("'in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in

support of his claim which would entitle him to relief.'" (citing *Conley*, 355 U.S. at 45-46)).[4]

The Federal Circuit did not even refer to these liberal pleading rules, instead holding that Casa had waived any argument based on the legal theory that Casa stepped into Norwest's shoes because this theory was not mentioned in Casa's complaint. Federal Circuit Opinion, 291 F.3d at 1366. This holding is in conflict with Courts of Appeal of the other circuits, which have recognized that a requirement that specific legal theories be pleaded in a complaint would be inconsistent with this Court's precedents and have held that a complaint should not be dismissed because it fails to identify the proper legal theory. *See, e.g., Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) (specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief); *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 421 (D.C. Cir. 1991) ("The days are long over when misnomer legitimately could occasion dismissal of a plea."); *Minger v. Green*, 239 F.3d 793, 799 (6th Cir. 2001) (legal labels characterizing a claim cannot determine whether a

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[4] This Court in *Scheuer* concluded that "[w]hen a federal court reviews the sufficiency of a complaint, before reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236.

complaint fails to meet the extremely modest standard for surviving a motion to dismiss). Thus, rather than give the complaint the benefit of liberal pleading rules required by this Court's decisions in *Conley* and numerous other cases, and followed in the other circuits, the Federal Circuit failed to address *Conley*'s mandate.

Because Federal Circuit's ruling can be applied to all the cases presented to it and it is a national court, the question of what pleading standards can be applied by it is of national importance and one that this Court should review.

CONCLUSION

For the foregoing reasons, Casa respectfully requests that this Court grant a writ of certiorari to settle the federal law on these important questions.

Dated: November 5, 2002

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United States Court of Appeals
for the Federal Circuit

01-5042

CASA DE CAMBIO COMDIV S.A. DE C.V.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Robert Ehrenbard Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiff-appellant. On the brief was Thomas C. Jackson.

Doris S. Finnerman, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her in the brief were Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; and Mark A. Melnick, Assistant Director. Of counsel on the brief were Rhonda Kent, and Tricia Long, Attorneys, Office of Chief Counsel, Financial Management Service, Department of the Treasury, of Washington, DC.

Appealed from: United States Court of Federal Claims

Judge Francis M. Allegra

United States Court of Appeals
for the Federal Circuit

01-5042

CASA DE CAMBIO COMDIV S.A. DE C.V.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: May 29, 2002

Before CLEVENGER, Circuit Judge, ARCHER, Senior Circuit Judge, and DYK, Circuit Judge.

DYK, Circuit Judge.

Casa de Cambio Comdiv S.A. de C.V. ("Casa") appeals from an order of the Court of Federal Claims dismissing Casa's complaint. Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137 (2000). Casa cashed a stolen United States Treasury check and deposited the check in its account with non-party Norwest Bank Minnesota, N.A. ("Norwest"), which, in turn, presented the check for payment by the Treasury. The Treasury, after discovering that the check was stolen, recouped the amount by debiting Norwest's account, after which Norwest debited Casa's account

with Norwest. Casa's complaint alleged that the government illegally exacted money from Casa in violation of federal regulations. Casa's complaint also alleged the government's action amounted to a taking and violation of the Due Process clause of the Fifth Amendment. Because the Court of Federal Claims properly dismissed the complaint, we affirm.

BACKGROUND

Casa's complaint is based on the following factual allegations.

Casa is engaged in the business of international currency exchange, has its principal place of business in Mexico City, and is incorporated in Mexico. On October 29, 1993, Genaro Alvarez ("Alvarez") presented to Casa a check drawn on the United States Treasury in the amount of $1,165,000. The check was made out to Alvarez as the payee. Unbeknownst to Casa the check had been stolen. Apparently the check listed no payee at the time it was stolen, and Alvarez's name was later filled in. Casa gave value for the check and forwarded it to Norwest, Casa's banker in the United States, for deposit and collection. On November 1, 1993, Norwest forwarded the check to the Federal Reserve Bank of Minnesota for collection. On November 4, 1993, the Federal Reserve Bank debited the Treasury account and gave immediate credit for the check to Norwest. There is no allegation that the drawer's signature was forged.

On November 17, 1993, the Treasury was informed that a number of checks had been stolen from the United States Postal Data Service Center in St. Louis, Missouri, including a check bearing the same serial number as the check cashed by Alvarez.

However, it was not until February 1, 1994, that the Treasury directed the Federal Reserve Bank to credit the full amount of the check to its account, acting pursuant to 31 C.F.R. 240.3(c), which provides: "The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination." 31 C.F.R. § 240.3(c) (2001). The Federal Reserve Bank did so on that same day and debited Norwest's account with the Federal Reserve Bank for the full amount of the check. Norwest then debited the full amount of the check from Casa's account with Norwest. Norwest's debiting of Casa's account caused Casa's account to be overdrawn by $659,665.63 on February 2, 1994.

On October 29, 1999, Casa filed suit against the United States in the Court of Federal Claims. Casa sought to recover on three separate theories. Count I alleged that the government did not reject payment on the check within a "reasonable time," in violation of 31 C.F.R. § 240.3 (c), (d). Count II alleged an illegal exaction without due process in violation of the Fifth Amendment. Count III alleged the government had taken Casa's property without just compensation as guaranteed by the Fifth Amendment. Casa sought to recover damages for the value of the check, the loss of use of funds, expenses incurred due to the overdraft in Casa's account with Norwest, legal fees and expenses, and the diminished value of its business due to a decline in Casa's reputation as a result of its overdrawn account with Norwest.

In a well-reasoned opinion the Court of Federal Claims dismissed count I for lack of jurisdiction holding that, even if the government had violated 31 C.F.R. Part 240, those regulations were "directed only

at protecting the Treasury's rights, rather than those of third parties. . . . [and] nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either 'expressly or by implication.'" Casa, 48 Fed. Cl. at 141 (internal citations omitted). The court dismissed count II (the Due Process claim) for failure to state a claim because the government had not required Casa to pay any money either to the government or to a third party. "Rather, [the funds] were recouped by a third party, Norwest, pursuant to its deposit contract with [Casa]." Id. at 144. The Court of Federal Claims similarly dismissed count III (the Takings claim) for lack of jurisdiction because "[i]t was Norwest and not the United States that took the action that resulted in the diminishment of [Casa's] funds and the involvement of the United States in that transaction was not 'sufficiently direct and substantial' to make the United States liable for a taking of those funds." Id. at 142-43 (quoting Nat'l Bd. of YMCA v. United States, 395 U.S. 85, 93 (1969) ("YMCA")).

Casa filed this timely appeal. We have jurisdiction pursuant to 28 U.S.C § 1295(a)(3).

DISCUSSION

I

This court reviews decisions of the Court of Federal Claims involving questions of jurisdiction and the failure to state a claim upon which relief can be granted without deference. Kanemoto v. Reno, 41 F.3d 641, 643 (Fed. Cir. 1994); Shelden v. United States, 7 F.3d 1022, 1026 (Fed. Cir. 1993). We review the Court of Federal Claims's interpretation of the constitution,

statutes, and regulations without deference. City of Tacoma v. Richardson, 163 F.3d 1337, 1339 (Fed. Cir. 1998).

II

Initially, it is useful to place the appellant's claims in context. Disputes concerning the legal rules governing the present fact situation or similar situations are not uncommon. Indeed, though one would not know it from the briefs, a similar factual situation led to the leading Supreme Court decision on federal common law - Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Typically, where a check has been stolen and the payee's endorsement has been added or forged, the dispute is between the Treasury and the bank that presented the check for payment. In Clearfield Trust, a Treasury check with a forged payee endorsement was tendered to the J.C. Penney Co. ("J.C. Penney") by someone who was not the payee of the check. 310 U.S. at 364. J.C. Penney cashed the check and endorsed it over to Clearfield Trust, which paid J.C. Penney. Id. at 365. Clearfield Trust then presented the check to the Federal Reserve Bank of Philadelphia, which paid Clearfield Trust. Id. Twelve days later the payee told the United States that he had never received the check. Id. The United States then informed Clearfield Trust and J.C. Penney of the forgery and, sixteen months after the check was cashed, informed Clearfield Trust that it sought reimbursement for the amount of the check. Id. The United States subsequently brought suit against Clearfield Trust to reclaim the amount of the check. Id. Clearfield defended on the ground that the United States had unreasonably delayed in seeking to recoup the amount

of the check. Id. at 366. The Supreme Court held that the rights and obligations between Clearfield and the United States were to be determined under federal common law because they related to commercial paper issued by the United States. Id.

On the merits in Clearfield Trust, the Supreme Court held that the government was not liable to Clearfield Trust because Clearfield Trust could "shift that loss to the drawee [the Treasury] only on a clear showing that the drawee's delay in notifying [it] of the forgery caused [it] damage." Id. at 370. The Supreme Court concluded that such damage had not been shown by Clearfield Trust, "who so far as appears can still recover from J.C. Penney Co." Id. The Court distinguished Price v. Neal, 3 Burr. 1354, 97 Eng. Rep. 871 (1762) as involving the situation of a forgery of the drawer's signature, in which the drawee is charged with immediate knowledge of the forgery, while Clearfield Trust involved the situation of a forgery of the payee's signature, knowledge of which the drawee could not be immediately charged. Id. at 369. Thirteen years later, when addressing a related factual situation involving a dispute between private parties, the Supreme Court clarified that the rights and obligations between the private parties (e.g., J.C. Penney and Clearfield Trust, or Casa and Norwest) are generally determined under state law because they do "not touch the rights and duties of the United States." Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956).

Although Clearfield Trust was a case in which the United States brought suit against the presenting bank, it is indeed difficult to believe that, where a debit has occurred, making affirmative legal action by the United States unnecessary, the presenting bank (here,

Norwest) is without legal recourse against the United States. Whether the claim is properly characterized as based on a contract, an implied contract, the Treasury regulations, or some other theory, we assume that a claim for an unreasonable delay in notification may properly be brought against the United States, and the case will be governed by the federal common law established in Clearfield Trust, as modified by the Treasury regulations. See United States v. Texas, 507 U.S. 529, 534 (1993).

This case, however, is unusual in that the depositer in the Clearfield Trust situation (Casa here, and J.C. Penney in Clearfield Trust) rather than the presenting bank (Norwest here, and Clearfield Trust in Clearfield Trust) seeks to assert rights against the United States. Clearfield Trust appears to assume that the United States would have no direct rights against the depositer, and that the depositer would have no direct claim against the Treasury. Instead, the depositer would have a claim against its own bank, and, presumably, under Parnell, that claim would be governed largely by state law. We find nothing in appellant's authorities that suggests a different result, or any pertinent constitutional infirmity in the regulatory process.

III

A claim against the United States may be based on a theory that a statute or regulation is money-mandating as to the plaintiff. In United States v. Testan, 424 U.S. 392, 401-02 (1976), the Supreme Court held that

> [w]here the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim– whether it be the Constitution, a statute, or a regulation– does not create a cause of action for money damages, unless . . . that basis "in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

(citation omitted). In Collins v. United States, we held that because "the Tucker Act does not mandate the payment of plaintiff's alleged damages, to recover he must base his claim on some other statute that creates a substantive right by mandating the payment of his claim. The statute relied upon must grant a right of action with specificity." 67 F.3d 284, 286 (Fed. Cir. 1995) (citing Testan, 424 U.S. at 400). In Collins, we held that a statute stating that the government "may settle, and pay in the amount not more than $ 100,000, a claim against the United States" was not money-mandating, because the payment of the claim was discretionary under the statute. Id.

Here, Casa urges that the Treasury regulations, 31 C.F.R. § 240.3(c), (d), may be fairly interpreted as mandating compensation by the government. The regulations provide that "[t]he Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination," 31 C.F.R. § 240.3(c) (2001), and "[c]hecks shall be deemed to be paid by the United States Treasury only after first examination has been fully completed," 31 C.F.R. § 240.3(d). Casa urges that the

Treasury's three-month delay before refusing payment of the check exceeded a reasonable time, such that the check should have been deemed paid according to 31 C.F.R § 240.3(d). Casa argues that once the check was deemed paid the Treasury could not refuse payment under 31 C.F.R. § 240.3(d), but would only be authorized to seek reclamation of the funds already paid and would have to follow the reclamation procedures under 31 C.F.R. §§ 240.6, 240.7. The reclamation procedures 31 C.F.R. §§ 240.6, 240.7 (2001), require that the Treasury provide the presenting bank with notice of its intent to reclaim the funds and an opportunity to protest the reclamation. Section 240.6 provides:

> (a) If, after a check has been paid by Treasury, it is found to:
>
> (1) Bear a forged or unauthorized indorsement; or
>
> (2) Contain any other material defect or alteration which was not discovered upon first examination, then, upon demand by the Treasury in accordance with the procedures specified in § 240.7 of this part, the presenting bank or other indorser shall refund the amount of the check payment.

Section 240.7(a) provides that "[f]or all reclamations an initial demand for refund of the amount of a check

payment will be made by sending a 'Request for Refund (Reclamation),' to the presenting bank or any other indorser. This Request shall advise the presenting bank of the amount demanded and the reason for the demand." Section 240.7 further provides that "the bank may, by filing a protest, request Treasury to review its decision that the bank is liable for the reclamation . . . . The Director, . . . who has supervisory authority over the Reclamation Branch, or his authorized subordinate, shall consider and decide any protest properly submitted under this paragraph." 31 C.F.R. §§ 240.7(a)(3), 240.7(c)(1) (2001). Thus, unlike refusals to pay under section 240.3, when operating under sections 240.6, 240.7, the Treasury must provide the presenting bank with notice of and an opportunity to protest the intended reclamation. The benefit to Casa from the Treasury's following this alternative is not entirely clear. Presumably, had the Treasury followed this alternative, an unexpected overdraft in Casa's account with Norwest would not have occurred.

However, even if we were to accept Casa's theory, the regulations would only apply to claims against the government by Norwest. Casa's theory does not explain how the regulations could be construed as being money-mandating as to Casa, even if they were money-mandating as to Norwest. We hold that the regulations are not money-mandating as to Casa since there is no indication that they were designed to convey rights on depositers of presenting banks.

IV

We next address Casa's claim that the Court of Federal Claims erred in dismissing the Takings Clause

count of its complaint. Casa does not argue that the government appropriated Casa's property directly or that the government directly imposed regulatory burdens on Casa that amounted to a taking. Rather, Casa argues that the government committed a regulatory taking when it caused Norwest (a private party) to take Casa's property when the government debited Norwest's account. Casa urges that Norwest's debiting of Casa's account as a result of the government's action against Norwest amounted to a taking of Casa's property by the government.

Under decisions of the Supreme Court and this court, a compensable taking does not occur unless the government's actions on the intermediate third party have a "direct and substantial" impact on the plaintiff asserting the takings claim. A variety of cases have held that particular government actions did not have such a direct and substantial effect on the plaintiff and thus did not constitute a taking of property from the plaintiff.

In YMCA, the YMCA brought suit against the government, alleging that a compensable taking of property by the government occurred when rioters damaged or destroyed YMCA buildings in Panama, some of which were occupied by U.S. troops. The Supreme Court noted that the YMCA had made no showing that any damage occurred as a result of the presence of the troops. 395 U.S. at 89. Moreover, the YMCA "would not have a claim for compensation under the Fifth Amendment even if [it] could show that damage inflicted by rioters occurred because of the presence of the troops." Id., 395 U.S. at 89. The Court held that the Constitution does not require compensation every time violence against the government results in damage to private property, and

that compensation to the YMCA was not required in that case because the government's involvement in the causation of the damage did "not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment." Id. at 93.

In each case in which we have applied the YMCA standard, we held that the government's involvement was not sufficiently "direct and substantial" to constitute a taking. See Shewfelt v. United States, 104 F.3d 1333, 1337 (Fed. Cir. 1997) (although county may have improperly taken title to property and United States government was aware of potential taking when it acquired property through purchase from county, acts of the county were not attributable to the United States, and the United States was not obligated to compensate owner); Erosion Victims of Lake Superior Regulation v. United States, 833 F.2d 297, 301 (Fed. Cir. 1987) (no "direct and substantial involvement" by the United States where international organization exercised its own discretion to raise water levels of lake causing damage to landowners' property); Langenegger v. United States, 756 F.2d 1565, 1572 (Fed. Cir. 1985) (where actual expropriation by foreign sovereign occurred, there was no Fifth Amendment taking by United States even though the United States engaged in "friendly" persuasion of the foreign sovereign to engage in the expropriation), cert. denied, 474 U.S. 824, (1985); see also Griggs v. Allegheny County, 369 U.S. 84, 89 (1962) (county government, not federal government, was liable for taking of air easement over claimant's property for use by county airport, even though airport was funded in part by a federal grant based on compliance with federal regulations). Finally, in B & G

Enterprises, Ltd. v. United States, 220 F.3d 1318 (Fed. Cir. 2000), cert. denied, 531 U.S. 1144 (2001), we held that the United States was not liable for a regulatory taking when a cigarette vending machine company lost business as a result of a California law restricting the lawful use of such machines. The United States had conditioned California's receipt of a block grant from the Department of Health and Human Services on the passage of such a law. Id. at 1321. We held that "California did not act as an agent of the United States by enacting the . . . vending machine restrictions and that the United States is therefore not responsible for that law's interference with [the claimant's] vending machine contracts . . . ." Id. at 1323.

In only one case, from our predecessor court, Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953), did we find the government's action towards a third-party to have a direct and substantial enough effect on the plaintiff to require compensation under the Takings Clause. Turney involved an embargo enacted by the Philippine government in 1947. Following the founding of the Republic of the Philippines just after World War II, the United States had conveyed to the Philippines certain surplus military supplies located at the Leyte Air Depot. Id. at 458. After the surplus was sold, it was discovered that classified radar equipment was among the surplus property that had been sold, and the United States notified the buyer that it would repossess the radar equipment by negotiation or seizure with the aid of the Philippine government. Id. at 459. The involvement of the Philippines was necessary "because the materials were located on soil under the sovereignty of the Philippine Government," rather than on a United States military base subject to United States sovereignty. Id. When negotiations

failed, the Philippines, "at the suggestion of representatives of the United States, . . . placed an embargo upon the exportation" of the radar equipment. Id. at 460. Ultimately, the United States Air Force took possession of the radar equipment from the buyer in exchange for a receipt for the equipment and a reservation of the right to sue for value. Id. at 464. We found that a taking had occurred and reasoned:

> The relations, at the time, between our Government and the Philippine Government, were close. Our armed forces had just liberated the Philippines from the Japanese. Our Government had given one hundred million dollars worth of surplus property to the Philippines, including the property at the Leyte Air Depot, and had sold the property for the account of the Philippine Government. When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied. We think that the taking occurred . . . when the Army officially took possession of the property.

Id. at 463-64.

We distinguished Turney in Langenegger, 756 F.2d 1565. In Langenegger, the plaintiff sought compensation from the United States for the expropriation of its coffee plantation located in El Salvador by the Salvadoran government as a result of agrarian reforms enacted in the country. The plaintiff

alleged that the United States was responsible for the expropriation because the United States government tied military and economic assistance to El Salvador to the implementation of agrarian reform by the Salvadoran government. Id. at 1567. We reiterated the applicability of the Turney standard, focusing on whether the United States's involvement was sufficiently direct and substantial to warrant its responsibility under the Fifth Amendment, but found that Langenegger's claim was factually distinguishable from the situation in Turney. Id. at 1572. We held that

> Where the actual expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible merely because its activity is that of "friendly" persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors. Diplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of direct and substantial involvement, however difficult refusal may be as a practical matter.

Id. at 1572.

Because the government did not direct Norwest to take action against Casa, and because Norwest did not act as the alter ego or agent of the government, Casa has not stated a claim for relief under the Takings Clause.

V

Our cases have established that there is no jurisdiction under the Tucker Act over a Due Process claim unless it constitutes an illegal exaction. Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987), cert. denied, 489 U.S. 1055 (1989); Inupiat Comy. of the Arctic Slope v. United States, 680 F.2d 122, 132 (Ct. Cl. 1982), cert. denied, 459 U.S. 969 (1982). An illegal exaction under the Due Process clause exists only if money has been "improperly exacted or retained" by the government. Testan, 424 U.S. at 401.

Citing Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996), Casa urges that an "illegal exaction claim lies even where money is not paid by the plaintiff directly to the government." Appellant's Br. at 19. In Aerolineas, the Immigration and Naturalization Service ("INS") refused to bear the costs of detaining illegal aliens who had arrived in the United States on the plaintiff's commercial flights as required by statute and instead required the plaintiff to bear these costs. 77 F.3d at 1568. We held that because the INS compelled the airlines to bear costs that the government had a legal duty to bear, the plaintiffs had alleged facts to state a claim for an illegal exaction of money by the government. Id. at 1574. Specifically, we held that if the airlines "made payments that by law the [INS] was obliged to make, the government has 'in its pocket' money corresponding to the payments that were the government's statutory obligation. Suit can be maintained under the Tucker Act for recovery of the money illegally required to be paid on behalf of the government." Id. at 1573-74.

Likewise, in Camellia Apartments, Inc. v. United States, 334 F.2d 667, 669 (Ct. Cl. 1964), cert. denied, 379

U.S. 963 (1965) Federal Housing Administration ("FHA") regulations required the plaintiff-apartment owners, who had originally financed the construction of their apartments through FHA-insured mortgages, to pay a prepayment charge upon refinancing their properties under conventional non-FHA-insured mortgages. The new mortgagees collected the prepayment charges and transmitted them to the FHA. We held that the plaintiffs had stated a claim for an illegal exaction because the new mortgagees were required by FHA regulations to collect the payments and remit them to the FHA, and under such circumstances the government could not "seriously deny plaintiffs' allegation that the mortgagees acted solely as the FHA's agents . . . ." Id. at 669.

These decisions do not bear Casa's broad interpretation, but only echo the standard in the Takings Clause context that a plaintiff has a claim for an illegal exaction only where the government has direct and substantial impact on the plaintiff asserting the claim. We conclude that this test is identical to the Takings test, and again that no such direct action by the United States is alleged here. The Court of Federal Claims properly dismissed this claim as well.[1]

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[1] Casa also argues that the Court of Federal Claims erred by not following certain prior decisions of that court. See, e.g., ABN Amro Bank N.V. v. United States, 34 Fed. Cl. 126 (1995); Fireman v. United States, 44 Fed. Cl. 528 (1999). However, this is not a ground for appeal to this court, because prior decisions of the Court of Federal Claims are not binding either on this court or the Court of Federal Claims. West Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994).

VI

The rejection of plaintiff's claims is also supported by a number of court of appeals cases rejecting nearly identical claims. In Alnor Check Cashing v. Katz, 11 F.3d 27 (3d Cir. 1993), Alnor cashed a Treasury check presented by Katz and made out to Katz's former employer. Alnor deposited the check in its account at the Philadelphia Savings Fund Society ("PSFS"), which apparently presented the check to a Federal Reserve Bank. Id. at 29. When the Treasury discovered the fraud, it sought reimbursement for the amount of the check from PSFS. Id. PSFS paid the government and debited Alnor's account. Id. Alnor brought suit alleging that the United States had wrongfully dishonored the Treasury check in violation of federal common law and regulations. Id. The Third Circuit held that because Katz's endorsement of the check was unauthorized within the meaning of the Treasury regulations, the United States was entitled to a refund from PSFS, and "[t]herefore the government's reclamation of the value of the check from PSFS did not wrongfully interfere with Alnor's contractual rights." Id. at 30-31.

In Dockstader v. Miller, 719 F.2d 327 (10th Cir. 1983), the Social Security Administration ("SSA") had inadvertently directly deposited in Dockstader's bank account amounts representing benefits to Dockstader's deceased husband. Id. at 328. When the government learned of the erroneous payments, the Treasury contacted the bank and sought a refund. Id. The bank made a refund to the Treasury and debited Dockstader's account without notifying her. Id. Dockstader brought suit against the government, alleging a violation of the Due Process clause. Id. at

329. The Tenth Circuit held that the bank's debiting of Dockstader's account "may not fairly be attributed to Treasury." Id. at 332 (citation omitted).

The facts in Powderly v. Schweiker, 704 F.2d 1092 (9th Cir. 1983), were similar to those in Dockstader. Powderly's husband died but continued to receive SSA benefit checks, which Powderly deposited in her bank account. Id. at 1094. When the SSA discovered this, it recouped the value of the benefits from Powderly's bank, which then debited Powderly's account. Id. Powderly brought suit against the government, alleging a violation of Due Process. Id. The Ninth Circuit rejected Powderly's claim. Id. In a concurring opinion, Judge Fletcher explained that if the government had debited Powderly's account, she would have a Due Process claim, but, because it was the private bank and not the government that debited the account, "no process was due from the government . . . ." Id. at 1099 (Fletcher, J., concurring). Further, Judge Fletcher explained:

> Nor can the actions of [the bank] in debiting Powderly's account be imputed to the federal government on some theory of agency. Sea-First's ability to debit appellant's account in the amount of the forged check derives not from some delegation of federal authority to the bank by the Treasury but from appellant's own depository contract with the bank and the self-help remedies authorized by Washington state law governing the relationship between financial organizations and their customers. Wash. Rev. Code Ann. § 62A.4-103 (1981); see

> Conner v. First National Bank of Sedro-Woolley, 113 Wash. 662, 665-66, 194 P. 562, 563 (1921); Allied Sheet Metal Fabricators, Inc. v. Peoples National Bank of Washington, 10 Wash. App. 530, 537-38, 518 P.2d 734, 739, aff'd, 83 Wash. 2d 1013, cert. denied, 419 U.S. 967, 42 L. Ed. 2d 183, 95 S. Ct. 231 (1974). Indeed, absent the sort of contractual arrangement under state law present here, a presenting bank could quite conceivably be unable to recover by debit a sum paid to a depositor on a check with an unauthorized endorsement, even though the Treasury, pursuant to federal law, is able to secure a refund from the bank. Thus, the bank in no way can be viewed as acting as the agent of the Treasury, since its rights of recovery against appellant are neither defined nor created by federal law.

Id. at 1099.

The sole contrary case is the Second Circuit decision in Breault v. Heckler, 763 F.2d 62 (2d Cir. 1985). There, on facts again similar to those in Dockstader and Powderly, widows who had deposited SSA benefit checks payable to their deceased husbands brought suit against the government alleging a Due Process violation when the government recouped money from their banks, causing the banks to debit their accounts without notice or an opportunity to protest. Id. at 63. Relying on state action cases and a foreseeability principle from the law of torts, the

Second Circuit held that, because the government could have foreseen that the banks would debit the widows' accounts, it was sufficiently intertwined with the actions of the banks, such that the government could be liable under the Due Process clause. Id. at 65.

We agree with the Third, Tenth, and Ninth Circuits, and disagree with the Second Circuit. The depositer, unlike the presenting bank, has no claim against the United States.

VII

Finally, Casa seeks the opportunity to establish that Norwest was in fact Casa's agent, thus allegedly enabling Casa as principal to step into the shoes of its agent, Norwest, and assert its claims against the government. The existence of an agency relationship, even if established, would not necessarily result in a waiver of sovereign immunity for suit by the principal. See generally Ins. Co. of the West, 243 F.3d 1367, 1373 (Fed. Cir. 2001) (subrogee, after stepping into the shoes of a government contractor, may bring suit under the Tucker Act); First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1293 (Fed. Cir. 1999)

(waiver of sovereign immunity allows shareholders to assert corporation's rights, but not to bring their own claims through the corporation). Even at common law the mere fact of an agency relationship does not automatically mean that the agent can step into the shoes of the principal and assert its rights against third parties.[2] In any event, we conclude that we need not address Casa's agency theory because it was not properly raised. No mention of this theory appears in Casa's complaint. Under the circumstances, we hold that Casa waived any claim it may have against the government based on such a theory.

CONCLUSION

For the forgoing reasons, we affirm.

COSTS

No costs.

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[2] The Restatement (Second) of Agency, § 293 (1958), recognizes that a third "party to a contract made by an agent on behalf of an disclosed or partially disclosed principal does not become liable to such principal upon it in an action at law if the principal is excluded as a party by the form or terms of the contract." See also id. at § 295 (recognizing that when an obligor gives a negotiable instrument to an agent on account of a principal not named or described in the instrument, the obligor "is not liable to the principal in an action upon the instrument, unless the principal is an endorsee or otherwise becomes the holder").

In the United States Court of Federal Claims

No. 99-910C

(Filed: October 27, 2000)

CASA DE CAMBIO COMDIV S.A. de C.V.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Forged Treasury Check; Damage Allegedly Caused by Violation of Treasury Regulation in Delaying Dishonor of Check; Jurisdiction; Failure to State a Claim, Money-Mandating Regulation; Taking; Illegal Exaction

Thomas C. Jackson, Kelly, Drye &Warren LLP, Washington, D. C., attorney of record for plaintiff.

Doris S. Finnerman, U. S. Department of Justice, Washington, D. C., with whom was Assistant Attorney General David K *Ogden*, for defendant.

DECIDED: October 27, 2000

OPINION

ALLEGRA, JUDGE

In its complaint, Casa de Cambio Comdiv S. A. de C. V. (plaintiff or Casa)claims that it was damaged

when the Department of the Treasury (Treasury)allegedly failed to follow its regulations by waiting several months before dishonoring a stolen check that plaintiff had received from a third party and presented to its bank. When, at Treasury's request, the Federal Reserve Bank recouped the funds that had been provisionally credited to the plaintiff's bank, the latter bank, in turn, debited the plaintiff's account. Plaintiff alleges that it is entitled to compensation under the relevant Treasury's regulations and that the Treasury's actions also amount either to a taking of its funds requiring just compensation or an illegal exaction of such funds. Defendant has moved to dismiss the complaint under RCFC 12(b)(l)and 12(b)(4).

I. Facts[1]

Casa is an international currency exchange company incorporated under the laws of Mexico, with its principal place of business in Mexico City, Mexico. On or about October 29,.1993, a Genaro Alvarez ("Alvarez") presented Casa with a check drawn on the Treasury in the amount of $1,165,000 (the "Check"), listing Alvarez as the payee. Casa gave value for the Check and forwarded it to Norwest Bank, Minnesota-N. A. ("Norwest"), for deposit and collection. On

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[1] "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Schew v. Rhodes*, 416 U. S. 232, 236 (1974). The court must presume that the factual allegations included in the complaint are true. *See Miree v. DeKalb County*, 433 U. S. 25, 27 n.2 (1977); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F2d 746,747 (Fed. Cir. 1988).

November 1,1993, Norwest forwarded the Check to the Federal Reserve Bank of Minnesota ("FRB-M")for collection. On November 4,1993, the FRB-M debited the Treasury's unclassified account and gave immediate provisional credit for the Check to Northwest. Notification of the debit and a microfilm copy of the Check were then forwarded to the Treasury. On November 5, 1993, Casa verified that the funds had been collected and were available in its account at Norwest.

On or about November 17,1993, the Treasury was informed that a number of its checks had been stolen from the U. S. Postal Data Service Center in St. Louis, Missouri. One of the stolen checks bore the same serial number as the Check. On November 23,1993, the Treasury confirmed that the Check had been presented and paid. However, it was not until more than two months later, on February 1,1994, that Treasury ordered the FRB-M to credit the full amount of the Check to its account. The FRB-M complied with this request, reversing the prior provisional credit and debiting Norwest's account, for the full amount of the Check. Norwest then reimbursed itself by debiting Casa's account. By February 2,1994, as a result of the debit, Casa's account at Norwest was overdrawn by $659,665.63.

Plaintiff filed suit in this court on October 29,1999, seeking compensation from defendant under the Treasury Regulations, for the taking of its property, and for an illegal exaction. On March 31,2000, defendant filed a motion to dismiss all three counts of the complaint for lack of subject matter jurisdiction and for failure to state a claim for which relief may be

granted. Oral argument was heard in this case on September 13, 2000.

II. Discussion

The Code of Federal Regulations specifies the procedures that Treasury must follow in dishonoring checks or reclaiming amounts erroneously paid thereon. The parties agree that the regulations permit the Treasury to decline payment of a forged check, 31 C.F.R. §§ 2403(c), 240.3(d)and 240.9(a)(3)(iv)(1993), and that the portion of the regulations dealing with reclamations, 31 C.F.R § 240.6 (1993), is inapplicable here because the defendant's reversal of the check was purportedly a declination, rather than a reclamation. However, plaintiff argues that Treasury did not comply with that portion of the declination regulations requiring it to decline payment "within a reasonable time." 31 C.F.R. §§ 240.3(c)and 240.9(a)(3)(iv)(1993).

This basic assertion forms the heart of the three separate counts in plaintiffs complaint. In Count I, plaintiff argues that the Treasury's regulations are money-mandating and that Treasury's failure to follow those procedures requires defendant to pay the "direct damages" incurred by Casa as a result of the violation.[2]

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[2] According to the complaint, these damages include $1,165,000, for the value of the Check; $700,000 for the value of the loss of use of the funds; $165,000 in expenses incurred to cover clients' checks returned unpaid due to the overdraft in plaintiffs Norwest account; $270,000 in expenses incurred in seeking to recoup the funds from the persons responsible for perpetrating a fraud against the plaintiff; and $5.5 million for the value of plaintiffs business, which it alleges was "confiscated" due to the reverse payment on the Check.

Count II alleges that Treasury's action in reversing the provisional credit violated the Due Process Clause of the Constitution and resulted in an "illegal exaction." Finally Count III avers that if Treasury's action was authorized by the regulations, the reversing of the provisional credit constituted a taking of plaintiffs funds under the Fifth Amendment to the Constitution. Defendant seeks the dismissal of each of these counts, alleging lack of jurisdiction and a failure to state a claim.

The court will deal first with plaintiff's claim that the Treasury Regulations are moneymandating and then turn to plaintiff's takings and illegal exaction claims.

A. The Treasury Regulations

In Count I of its complaint, plaintiff alleges that it is entitled to damages based upon the Treasury's violation of its regulations. Defendant, for its part, argues that such regulations are not "money-mandating" and thus do not provide an independent basis for jurisdiction in this court.

The Tucker Act, 28 U. S. C. § 1491(a)(l), grants this court jurisdiction over monetary claims based on an alleged violation of a federal statute, providing that the "Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon. . . any Act of Congress or any regulation of an executive department . . . ." The Tucker Act, however, merely confers jurisdiction on this court, it does not "create any substantive right enforceable against the United States for money

damages." *United States v. Mitchell,* 445 U. S. 535, 538 (1980)(quoting *United States v. Testan,* 424 U. S. 392, 398 (1976), *reh'g denied,* 446 U. S. 992 (1980)); *see also Saraco v. United States,* 61 F.3d 863, 865 (Fed. Cir. 1995), cert. *denied,* 517 U. S. 1166 (1996)(citing *Zumerling v. Devine, 769* F3d 745, 749 (Fed. Cir. 1985)); *United States v. Connolly,* 716 F.2d 882, 885 (Fed. Cir. 1983)(*en banc*), *cert. denied,* 465 U. S. 1065 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. *See Mitchell,* 445 U. S;. at 538. For claims founded upon a statute or regulation to be successful, the provisions relied upon must be susceptible to fair interpretation as "mandating compensation by the Federal Government." *United States v. Testan,* 424 U. S. at 400 (quoting *Eastport S. S. Corp. v. United States, 372* F.2d 1002,1009 (1967)).

Plaintiff argues that because, under the regulations, Treasury has a reasonable time to examine checks and decline payment, "[i]t is logical that the consequences to the Treasury of its failure to make its examination within a reasonable time, while not specified in the text of the regulations, can fairly be read to include payment of compensation." The court is not persuaded. The Supreme Court made clear in *Testan* that "the violation of any statute or regulation . . . [does not]automatically create[] a cause of action against the United States for money damages." 424 U. S. at 401. It explained that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity," concluding further that 'we regard as . unsound the argument. . . that all substantive rights of necessity create a waiver of sovereign immunity such that

money damages are available to redress their violation." *Id.* at 400. Along these lines, this Court has held "[i]t is not enough that plaintiff sustained money damages; plaintiff must point to a specific source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Son Broadcasting, Inc. v. United States*, 42 Fed. Cl. 532, 535 (1998)(quoting *Testan*, 424 U. S. at 400).

Here, as plaintiff admits, the relevant provisions do not provide for monetary relief if violations occur and, contrary to plaintiff's claim, appear directed only at protecting the Treasury's rights, rather than those of third parties. In fact, the regulations do not so much as mention depositors, depository institutions or presenting banks, stating instead, in relevant part, only that "[t]he Treasury shall have the usual right of a drawee to examine checks . . . and refuse payment" and "shall have a reasonable time to make such examination." 31 U. S. C. § 240.3(c). Accordingly, nothing in the language of the regulation unequivocally grants a depositor in plaintiff's position a right to recover damages either "expressly or by implication." *Eastport S. S.*, 327 F.2d at 1007. *See also Brown v. United States*, 86 F.3d 1554, 1564 (Fed. Cir. 1996) ("[t]he substantive law mandating compensation may be either express or implied, but it must be unambiguous"). Therefore, plaintiff's claim based upon Treasury's alleged violation of the regulations must be dismissed for lack of jurisdiction.

B. Takings

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." The Just Compensation Clause was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U. S. 40, 49 (1960). The case law has identified two categories of takings -physical and regulatory. A physical taking occurs when the government seizes property. *Lorefto v. Teleprompter Manhattan CATV Corp.,* 458 U. S. 419, 427 (1982). By contrast, a regulatory taking occurs when the government imposes a condition on private property that limits or prohibits any beneficial use thereof by the private owner. *Penn Central Transportation Company v. City of New York,* 438 U. S. 104, 124 (1978).

The United States may be held *responsible* for a taking even when its action is not the final direct cause of the property loss or damage. In such circumstances, however, a taking will be found only if the government's involvement "is sufficiently direct and substantial to require compensation under the Fifth Amendment." *National Bd. of YMCA v. United States,* 395 U. S. 85, 93 (1969). *See also Marvel Engineering Co. v. United States,* 14 Cl. Ct. 614, 621 (1988). The Federal Circuit applied this principle in *Shewfelt v. United States,* 104 F.3d 1333, 1337 (Fed. Cir. 1997). In that case, real property that had been deeded to the state for non-payment of county taxes was deeded back to the county where the property was located, and then sold to the United States in a prearranged transaction.

Under state law, the state's sale of the property to the county extinguished the original owner's redemption rights. Because of inadequate county records, notice of the sale was not provided to the plaintiff in time for him to exercise his redemption rights on all his parcels before they were extinguished This court held that because the United States was aware of the inadequate county records and the strong likelihood that notice of the sale would not be received, it effectuated a taking of plaintiff's interest in the land when it decided to purchase the land from the county instead of purchasing or condemning the property.

The Federal Circuit reversed, holding that "the United States is not liable for a taking based on its persuasion of the county to obtain the property from the state for resale to the Navy." *Id.* at 1338. By way of explanation, it stated:

> it was California and not the United States that took the action that resulted in the extinguishment of any interest Shewfelt may have had in the tax-deeded lands the Navy purchased from the county. The involvement of the United States in that transaction was not "sufficiently direct and substantial" to make the United States liable for a taking of that interest. If Shewfelt has any valid taking claim resulting from the extinguishment, it would be against California, and not against the United States.

Id. The Federal Circuit thus concluded that despite the fact that, pursuant to a prearranged transaction, the United States expected that the state would take the action that produced the injury, the actions of the state and county in extinguishing the owner's interests could not be attributed to the United States for purposes of imposing taking liability. *Id.* at 1337-38.

In reaching this conclusion, the Federal Circuit relied on its prior decision in *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990). There, retired members of the armed forces claimed that the United States effectuated a taking by enacting a federal statute that overruled a U. S. Supreme Court decision and permitted states to treat military retirement pay as community property, thereby allowing it to be divided between divorcing spouses. In affirming the decision of this court that no taking had occurred, the Federal Circuit opined:

> It is true that Congress expected community property states would be likely to take steps to divide military retired pay between spouses under divorce decrees after [the statute's]enactment . . . . However, we cannot agree that the award of benefits to Fern's former spouse by the state became an act of the United States because Congress was aware that the community property states could take this action if Congress lifted the bar of preemption.

Id. at 959. The Federal Circuit applied a similar analysis in *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297 (Fed. Cir. 1987), wherein it

held that the government's successful request to an international commission to raise the water level of Lake Superior did not constitute "direct and substantial" involvement in the commission's decision, so as to give rise to a taking. *See also Langenegger v. United States,* 756 F 2d 1565 (Fed. Cir. 1985), *cert. denied,* 474 U. S. 824 (1985) (expropriation of plaintiff's property by the El Salvador government pursuant to legislation passed at the prompting of the United States held not a taking by the United States).

These cases teach that a taking claim will not lie even if the United States knows that its actions will pave the way for another to lose property at the hands of a third party. Applying this rule to the current case leads this court to conclude that although the Treasury likely expected that Norwest would debit Casa's account, that expectation did not make that debiting an act of the Treasury for purposes of the Takings Clause of the Fifth Amendment. It was Norwest and not the United States that took the action that resulted in the diminishment of the plaintiff's funds and the involvement of the United States in that transaction

was not "sufficiently direct and substantial" to make the United States liable for a taking of those funds.[3] Accordingly, Count III of plaintiffs complaint must be dismissed.[4]

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[3] In arguing to the contrary, plaintiff relies heavily on *Breault v. Heckler*, 763 F.2d 62 (2d Cir. 1985). There, surviving spouses challenged, as violative of due process, the government's method of recovering social security payments that were erroneously continued after the beneficiaries' deaths. The Second Circuit held that, under due process, the government could be held liable for the private debiting of the account if it "exercised coercive power" or provided "significant encouragement." *Id.* at 64. It concluded that "[w]here, as here, the Government demands money from a bank in an amount calculated to reflect deposits made in an individual account, knowing full well as it does, so that the bank inevitably will debit that account for the amount so taken," there is sufficient governmental action to support a due process claim. *Id.* at 65. However, the standard employed in *Breault* to define state action is clearly broader than that employed by the Supreme Court and the Federal Circuit in analyzing takings claims. Further, other circuits have concluded that Treasury's action in obtaining payment from a presenting or depository bank does not convert the bank's subsequent debiting of a depositor's account into state action. *See Alnor Check Cashing v. Katz*, 11 F.3d 27, 30 n.2 (3d Cir. 1993) (actions of depository bank in debiting customer's account due to forged Treasury check may not attributed to the government); *Powderly v. Schweiker*, 704 F.2d 1092, 1099 (9th Cir. 1983) (Fletcher, J., concurring)(bank's action cannot "fairly be attributed" to the government); *Dockstader v. Miller*, 719 F.2d 327, 332 (10th Cir. 1983)(same), *cert. denied*, 467 U. S. 1256 (1984).

[4] Based upon this finding, the court does not reach defendant's argument that plaintiff's loss of funds stemmed from a government-imposed obligation to pay "money," and, as such, is not susceptible to a takings analysis. *But see Eastern Enterprises v. Apfel*, 524 U. S. 498, 542 (1998)(Kennedy, J., concurring)(no taking of money).

C. Illegal Exaction

In Count II of its complaint, plaintiff alleges that the Treasury's action violated the Fifth Amendment's Due Process Clause, resulting in an illegal exaction. The Federal Circuit has held that this court lacks jurisdiction over claims based on due process violations because, "[a]lthough the Fifth Amendment's due process clause provides that no person shall be deprived of property without due process of law, no language in the clause itself requires the payment of money damages for its violation. *"Murray v. United States,* 817 F.2d 1580, 1583 (1987), *cert. denied,* 489 US; 1055 (1989). *See also Medina Construction, Ltd. v. United States,* 43 Fed. Cl. 537,558 (1999) ("This court lacks jurisdiction over causes of action alleging violations of the Fifth Amendment principles of due process or equal protection."); *New York Power Authority v. United States,* 42 Fed. Cl. 795, 801 (1999) (same). However, the courts have reached a different result in so-called "illegal exaction" cases.

Under the Tucker Act, illegal exaction jurisdiction lies where a plaintiff "has paid money over to the Government, directly or in effect," and "seeks return of all or part of that sum arguing" that it "was improperly paid, exacted, or taken from [it]in contravention of the Constitution, a statute, or a regulation." *Eastport S. S. Corp.*, 372 F.2d at 1007-1008.[5]

In illegal exaction cases, in contrast to other actions for money damages, jurisdiction exists even when the Constitutional provision allegedly violated does not contain compensation mandating language. *Bowman v. United States,* 35 Fed Cl. 397,401 (1996). For example, in *Mallow v. United States,* 161 Ct. Cl. 446 (1963), this court's predecessor was faced with a claim

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[5] See United States v. Testan, 424 U. S. 392, 400-02 (1976) (referencing Court of Claims jurisdiction over claims "for money improperly exacted or retained"); New York Life Ins. Co. v. United States, 118 F.3d 1553, 1556 (Fed. Cir. 1997), cert. denied, 118 S. Ct. 1559 (1998); . Aerolineas Argentinaz v. United States, 77 F. 3d 1564, 1572-73 (Fed. Cir. 1996); South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 626 (1964), cert. denied, 379 U. S. 964 (1965). See also Charles Alan Wright, Arthur R Miller & Edward H. Cooper, Federal Practice and Procedure § 3657 at p. 487 (3d ed. 1998). As Eastport's formulation of this doctrine indicates, illegal exaction jurisdiction clearly exists when the exaction is based on an asserted regulatory power. For example, in Eversharp, Inc. v. United States, 125 F. Supp. 244, 247 (Ct. Cl.. 1954), this court's predecessor held that it had jurisdiction., under the Tucker Act, to consider a monetary claim that the government had illegally exacted money by enforcing a regulation that was contrary to statute. See also Pan American World Airways v. United States, 122 F. Supp. 682, 683-84 (Ct. Cl. 1954)(" the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction and not a tort). But cf. United States v. Nederlandsch-Amerikaansche Stoomvaart Maatschappij, 254 U. S. 148 (1920) (unauthorized coercion of payments by governmental agents is tortious).

by a civilian seeking to recover a fine imposed by a courts-martial that had no jurisdiction over him. In these circumstances, the Court of Claims found that the fine was collected in violation of due process and concluded that "it seems that the plaintiffs claim for the recovery of the money that was taken from him by the Government without due process of law may be properly regarded as one 'founded . . . upon the Constitution,' for purposes of 28 U. S. C. 1491." 161 Ct. Cl. at 454 .(alteration in original). More recently, in *Commonwealth Edison Co. v. United States,* 46 Fed. Cl. 29, 42-43 (2000), appeal docketed, No. 00-5069 (Fed. Cir. Apr. 26,2000) this court concluded that it had illegal exaction jurisdiction to consider claims that money had illegally been collected by the government pursuant to a provision that allegedly violated due process.[6]

These decisions demonstrate that this court has jurisdiction to consider whether the alleged violation of the regulations led to an illegal exaction violative of the Due Process Clause, despite the fact that clause does not contain compensation mandating language. But, the foregoing analysis does not resolve completely whether plaintiff's illegal exaction claim is properly stated. Completing that analysis requires the court to consider, in addition, whether such a claim may be legally sustained where the government does not directly obtain funds from plaintiff, but rather takes an action that leads a third party to recoup such funds.

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[6] *See also Doherty v. United States,* 500 F.2d 540, 542 (Ct. Cl. 1974)(court had jurisdiction over claim that application of a forfeiture statute that violated equal protection was a taking); *Bowman v. United States,* 35 Fed. Cl. 397, 401(1996)(illegal exaction jurisdiction lies to consider claims that property had been forfeited in violation of the Double Jeopardy Clause).

To be sure, the Federal Circuit has held that an illegal exaction claim lies even where . money is not paid by the plaintiff directly to the government. Thus, at issue in *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996), was whether the Immigration and Naturalization Service's refusal to bear the airline's costs of detaining illegal aliens, who had attempted to enter the country on commercial flights, constituted an illegal exaction. In concluding that such a claim was properly stated, this court's predecessor held that "[t]he amount exacted and paid may be recovered whether the money was paid directly to the government, or was paid to others at the direction of the government to meet a governmental obligation." *Id.* at 1573 (citing *Clapp v. United States*, 117 F. Supp. 576, 580 (Ct. Cl.), *cert. denied*, 348 U. S. 834 (1954)). Similarly, in *Camellia Apartments, Inc. v. United States*, 334 F.2d 667 (Ct. Cl. 1964), *cert. denied*, 379 U. S. 963 (1965), the court held that an illegal exaction claim was stated when the Federal Housing Administration (FHA) required the plaintiffs to pay private mortgagees a charge on behalf of the FHA, allegedly in violation of statute.

In the instant case, however, the funds in question were neither paid directly to defendant, nor paid to a third party at the direction of defendant, nor even recouped from plaintiff at the .direction of the defendant. Rather, they were recouped by a third party, Norwest, pursuant to its deposit contract with plaintiff. Plaintiff presumably could have sued Norwest, claiming that it violated that contract by debiting plaintiff's account and that Norwest instead should have rebuffed the Federal Reserve's attempt to reverse, on an untimely basis, the provisional credit on

the Check. In that event, Norwest likely would have interpled the United States, claiming that if it was liable to plaintiff, the Treasury was liable to Norwest for dishonoring the check in violation of its regulations. In this way, plaintiff could have tested whether the Treasury's exercise of authority here was consistent with the requirements of the regulations. But, this did not occur, and plaintiff instead has filed suit directly against the United States, claiming that Treasury's dishonoring of the Check initiated a process that inevitably led to its account being debited. While, for purposes of this motion, the court must presume that Treasury's actions were the genesis of Casa's loss, in the court's view, the illegal exaction doctrine cannot be stretched so far as to encompass plaintiff's claim. Several reasons lead to this conclusion.

First, the jurisdictional hook of the "illegal exaction" doctrine, as described in *Clapp* V. *United States,* 117 F. Supp. at 580, is not so much that "the Government has the citizen's money in its pocket," but that that money was exacted as a direct result of the application of a statute or a regulation. only then, according to *Clapp,* may an illegal exaction claim be viewed as founded upon a law or regulation so as to trigger this court's jurisdiction under 28 U. S. C. § 1491. In reaching this conclusion, the court in *Clapp* reviewed various cases, among them *Christie-Street Commission Co. v. United States,* 136 Fed. 326, 331 (8th Cir. 1905), in which the Eighth Circuit held that a claim is founded upon a law if it "conditions and determines its validity." Based upon this extensive review, the Court of Claims concluded that "[o]ur best estimate of the present law is that a claim to recover an illegal exaction made by officials of the Government, which exaction is

based upon a power supposedly conferred by a statute, is. a claim 'founded upon any Act of Congress." *Clapp*, 117 F. Supp. at 580. By comparison, in the instant case, the "exaction" that . occurred against Casa was not "based upon a power supposedly conferred by a statute" or regulation, but rather derived from the enforcement of alleged rights under a contract to which the government was not a party.[7] As such, Casa cannot claim that the United States has Casa's funds "in its pocket," at least insofar as that concept is appropriately construed under section 1491.

Second, while the Court of Claims in *Eastport SS.* recognized that the government could, "in effect," have the citizen's funds, that concept has never been construed to include a situation in which there was not some form of government compulsion or direction pursuant to a statute or a regulation. *See Cievenger Roofing & Sheet Metal Co. v. United States*, 8 Cl. Ct. 346, 352 n.6 (1985). *See also GMO. Niehaus Co. v.* United *States*, 153 F. Supp. 428, 432 (Ct. Cl. 1957). Essentially, plaintiffs claim is that the Treasury set into motion a sequence of events that ultimately resulted in its loss. But, neither Treasury nor the Federal Reserve ordered Norwest to debit plaintiff's account, as might be the case in a tax levy. Rather, Norwest made an independent decision to exercise what it believed were its rights under its deposit contract with Casa. To hold this enough to impose illegal exaction liability on the

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[7] Plaintiff does not allege that it somehow was a third-party beneficiary of an implied contract between the United States and Norwest. Such a claim would face severe hurdles. *See State of Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (describing requirements for third-party beneficiary contract jurisdiction).

government would be to open a whole range of new justiciable claims essentially focusing on whether the government proximately caused some third party's injury, thereby adopting a new form of liability primarily based on foreseeability. One can conceive of a garden variety of situations where, for example, the government imposes a cost on an entity, that entity shifts the cost to a third party and the third party might argue the government's action in dealing with the intermediary was unconstitutional or violative of a statute or regulation. While the "injury" to a third party in these circumstances may well be reasonably foreseeable or even occur with the government's full knowledge, that, in this court's view, is no more adequate to impose illegal exaction liability than it is, under the decided case law, to impose liability under the Takings Clause.

This latter point bears a further word of elaboration. Several cases hold that, under the illegal exaction doctrine, a plaintiff may seek the return of the monetary value of property seized or otherwise obtained by the government. *See Bowman*, 35 Fed. Cl. at 401 ("cases such as the instant one - where the Government exacts property which it later sells and for which it receives money -- must necessarily qualify for consideration under the established illegal exaction

jurisdiction"); *Bernaugh v. United States*, 38 Fed. Cl. 538, 543 (1997), *affd*, 168 F.3d 1319 (Fed. Cir. 1998)(same).[8] Under these decisions, then, a plaintiff who has lost property may, at least in some circumstances, bring either a takings claim or an illegal exaction claim (or both, in the alternative). In the takings context, were such a claim based upon a loss only indirectly caused by the government, the plaintiff would be required to demonstrate under YMCA, *Shavfelt* and *Fern* that the government's involvement was "sufficiently direct and substantial." Were this court to hold that a similar requirement did not apply in the context of an illegal exaction, plaintiffs, in the future, would simply recast their takings claims in illegal exaction terms and thereby avoid the jurisdictional hurdles imposed by the established case law. This court refuses the opportunity to create such a serious incongruity between takings and illegal exaction jurisprudence.

Such an expansion of illegal exaction jurisdiction would not only be inconsistent with the legal rationale underlying that jurisdiction, but would be particularly unwarranted in light of the Supreme Court's repeated admonition that waivers of sovereign immunity "must be 'construed strictly in favor of the sovereign,'." *United States v. Nordic Village, Inc.*, 503 U. S. 30, 34

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[8] *See also Litzenberger v. UnitedStates*, 89 F.3d 818, 820 (Fed. Cir. 1996)(suggesting that the value of seized property could be recouped as an illegal exaction under the Little Tucker Act); *GMO. Niehaus Co.*, 153 F. Supp. at 432 (illegal exaction jurisdiction from property seizure). *Compare Cracker v. United States*, 125 F. 3d 1475,1477 (Fed. Cir. 1997)(no illegal exaction jurisdiction in the Court of Federal Claims over forfeitures under the Controlled Substance Act because such cases are assigned statutorily to the district courts).

(1992) (quoting *McMahon v. United States*, 342 U. S. 25, 27 (1951)).[9] Indeed, in other contexts, this court and others have been hesitant to find waivers of sovereign immunity where there was no privity between the putative plaintiff and the United States, ordinarily finding waivers only where the plaintiff was viewed as essentially standing in the shoes of the entity that dealt with the government. Thus, for example, in *First Hartford. Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1293 (Fed. Cir. 1999), the Federal Circuit concluded that this court had jurisdiction over a shareholder action alleging a taking because the shareholders "step[ped]into the shoes of the corporation and file[d]suit as fiduciaries on the corporation's behalf and for the corporation's benefit." *See also Slattery v. United States*, 35 Fed. Cl. 180 (1996)(same); *Suess v. United States*, 33 Fed. Cl. 89, 93-94 (1995)(same). Here, Casa in no way stands in the shoes of the presenting bank Norwest -- indeed, for reasons not apparent, Norwest apparently eschewed filing its own lawsuit against the United States to recoup those funds that it could not collect from Casa's overdrawn account. Moreover, in *First Hartford*, the Federal Circuit emphasized that "permitting derivative suits would not extend the jurisdiction of the Court of

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[9] *See also Department of the Army v. Blue Fox, Inc.*, 119 S.Ct. 687, 691 (1999) (sovereign immunity is "strictly construed, in terms of its scope, in favor of the sovereign.") This rule appears to have originated in *Schillinger v. United States*, 155 U.S. 163, 166 (1894), where the Court stated that "[b]eyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be in their possession of a larger jurisdiction over the liabilities of the Government." *See also* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L.Rev. 771, 778.

Federal Claims to a class of claims not previously within its jurisdiction, but rather would permit standing to shareholders to raise a corporation's direct contract claims under a narrow set of circumstances." *First Hartford,* 194 F.3d at 1293. Such is not the case here.

For its part, plaintiff cites two cases in support of its illegal exaction claim. In the first, *ABN Amro Bank N. v. United States,* 34 Fed. Cl. 126 (1995), the court was faced with a check cashing scenario which is very analogous to the instant case. The court analyzed various affirmative defenses raised by the United States. against a depositing bank that sought to recoup damages stemming from Treasury's alleged failure to comply with its regulations in dealing with a forged check. The last defense so raised asserted a lack of illegal exaction jurisdiction, to which the court responded:

> Defendant presents an affirmative defense that plaintiff has failed to state a claim upon which relief may be granted. Plaintiff alleges that defendant exacted funds from plaintiff based on a misapplication of Treasury regulations. This court has jurisdiction over such a claim of illegal exaction. *See Eastport S. S. Corp. v. United States,* 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967)(the Tucker Act grants the Court of Federal Claims jurisdiction over a claim that "money or property has been. . . exacted, or taken 6rom the claimant in contravention of the Constitution, a statute, or a regulation").

> Plaintiffs motion to strike defendant's affirmative defense of failure to state a claim is therefore granted.

Id. at 136. This quote constitutes the court's full discussion of this issue and thus the court did not reveal further the rationale for its conclusion that plaintiffs complaint stated a claim. Based on the foregoing analysis, this court, with all due respect, must reject the conclusion reached in *Amro.*

The second case on which plaintiff relies is *Fireman v. United States,* 44 Fed. Cl. 528 (1999). There, the Federal Election Commission (FEC)determined that certain campaign contributions were illegally made. The affected campaign was required to disgorge the funds and elected to pay an amount corresponding to the amount of the contributions to the government, rather than to the original contributors. Invoking the court's illegal exaction jurisdiction, the contributors sued to recover the amount of their contributions from the United States, claiming that the FEC had violated its regulations in. holding the contributions illegal. Rejecting the defendant's assertion that plaintiffs complaint failed to state a claim, the court ruled that "under the facts of this case, . . . government 'coercion' is not required" to state an illegal exaction claim. The court gave four reasons for this conclusion, holding that: (i)*Aerolineas Argentinas, supra,* illustrated that the concept of "illegal exaction" is "not strictly construed;" (ii)the government, in effect, had the contributors "money in its pocket;" (iii) there was government compulsion because, in a formal opinion, the FEC had changed its construction of its regulations to permit the campaign to make the payment to the government,

whereas the regulations had previously been construed to require illegal contributions to be returned to the donor; and (iv) "as a matter of policy," plaintiffs were entitled to pursue their claim because there was no other way to challenge the FEC's interpretation of its regulations. 44 Fed. Cl. at 536-37.

While admittedly there is some tension between *Fireman*. and the analysis herein,[10] it remains that there are several major factual distinctions between that case and the instant case. For example, the court in the *Fireman* case held that there was compulsion and that the FEC's changed construction of its regulations had a "coercive quality to it." 44 Fed. Cl. at 536. Here, by comparison, Norwest neither acted at the government's behest nor pursuant to a statute or a regulation, but rather in its own self-interest, based upon contractual rights. Moreover, in *Fireman,* the court based its decision, in part, on its belief that "as a matter of policy, . . . the Plaintiffs are entitled to their day in court." 44Fed. Cl. at 536. Finding that "compelling equities" supported the court's exercise of jurisdiction, the court observed that a contrary ruling would deprive plaintiffs of any relief whatsoever. *Id.* Here, by contrast, the plaintiff could have sued Norwest for breach of its deposit relationship and, in that lawsuit, could have argued that Norwest should not have honored the Federal Reserve's request because it was contrary to the regulations. The fact that such a suit is now likely time-barred does not alter

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[10] In particular, the court cannot reconcile its view of the cases holding that waivers of . sovereign immunity should be narrowly construed with the Fireman court's observation that the concept of illegal exaction is "not strictly construed."

the reality that plaintiff had a remedy, but chose not to pursue it. In these circumstances, unlike perhaps the situation in *Fireman,* "compelling equities" thus do not demand that this court exercise jurisdiction. *Cf. Library of Congress v. Straw,* 478 U. S. 310, 321 (1986) ("But policy, no matter how compelling, is insufficient, standing alone, to waive this immunity.").

III. Conclusion

For the foregoing reasons, Counts I and III of plaintiff's complaint shall be dismissed for lack of jurisdiction. Count II of the complaint shall be dismissed for failure to state a claim.[11]

IT IS SO ORDERED.

Francis M. Allegra
Judge

[11] Based on this conclusion, the court finds it unnecessary to reach defendant's arguments that plaintiff's damages in this case should be limited to the face amount of the Check.

United States Court of Appeals
for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same is hereby DENIED.

The mandate of the court will issue on August 14, 2002.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: August 7, 2002

cc: Thomas C. Jackson
Doris S. Finnerman

CASA DE CAMBIO V. US, 01-5042
(CFC - 99-CV-910)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

31 C.F.R. § 240.3
Limitations on Payment

(c) The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination.

31 C.F.R. § 240.6
Reclamation of Amounts of Paid Checks

(a) If, after a check has been paid by Treasury, it is found to:

(1) Bear a forged or unauthorized indorsement; or

(2) Contain any other material defect or alteration which was not discovered upon first examination, then, upon demand by the Treasury in accordance with the procedures specified in § 240.7 of this part, the presenting bank or other indorser shall refund the amount of the check payment.

Supreme Court, U.S.
FILED
FEB 12 2003
OFFICE OF THE CLERK

(2)

No. 02-710

In the Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

A Department of the Treasury regulation provides that "[t]he Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks," and that the Treasury has "a reasonable time" in which to make such examination. 31 C.F.R. 240.3(c). The questions presented are:

1. Whether a claim for money damages may be brought against the United States for its alleged failure to examine a check and to refuse payment within "a reasonable time," where the plaintiff is not the bank that presented the check to the Treasury for payment, but rather the depositor of the check, which the Treasury discovered to have been stolen and altered.

2. Whether petitioner waived its argument that it may assert any claims that the presenting bank might have against the United States.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 291 F.3d 1356. The opinion of the Court of Federal Claims (Pet. App. 24-48) is reported at 48 Fed. Cl. 137.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2002. A petition for rehearing was denied on August 7, 2002 (Pet. App. 49). The petition for a writ of certiorari was filed on November 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has directed the Secretary of the Treasury to prescribe regulations governing the payment of checks drawn on the United States Treasury. 31 U.S.C. 3328(e)(1)(B) and (C). "Nothing" in the statute, however, "limits the authority of the Secretary to decline payment of a Treasury check after first examination thereof at the Treasury." 31 U.S.C. 3328(f).

Pursuant to that statutory authority, the Department of the Treasury (Treasury) has promulgated regulations that "prescribe the requirements for indorsement and the conditions for payment of checks drawn on the United States Treasury." 31 C.F.R. 240.1. See generally 31 C.F.R. Pt. 240. Section 240.3 of those regulations imposes several "[l]imitations on payment," including the following:

> (c) The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination.
>
> (d) Checks shall be deemed to be paid by the United States Treasury only after first examination has been fully completed.

31 C.F.R. 240.3(c) and (d). The Treasury regulations also establish requirements for the "[p]rocessing of checks." 31 C.F.R. 240.9 (2001). Each Federal Reserve Bank (FRB), as a depository of public funds, is required to receive checks from member and nonmember banks and other depositors "when indorsed by such banks or depositors who guarantee all prior indorsements thereon." 31 C.F.R. 240.9(a)(3)(i) (2001). The FRBs must "[g]ive immediate credit" for such checks "in ac-

cordance with their current Time Schedules and charge the amount of the checks cashed or otherwise received to the account of the Treasury, *subject to examination and payment by the United States Treasury.*" 31 C.F.R. 240.9(a)(3)(ii) (2001) (emphasis added). If, upon the first examination authorized by Section 240.3(c), Treasury refuses payment of any check, the FRBs are required to "give immediate credit therefor in the United States Treasury's account, thereby reversing the previous charge to the account for such check." 31 C.F.R. 240.9(a)(3)(iv) (2001).

The Treasury regulations also provide for the "[r]eclamation of amounts of paid checks." 31 C.F.R. 240.6. That alternative process provides a mechanism for Treasury to reclaim funds *after* first examination has been fully completed and a check is deemed to have "be[en] paid" under Section 240.3(d). *Ibid.* If Treasury invokes that process, which it may use to reclaim funds that should not have been paid due to "a forged or unauthorized indorsement" or "any other material defect or alteration which was not discovered upon first examination," 31 C.F.R. 240.6(a)(1) and (2), Treasury sends "the presenting bank or any other indorser" a "Request for Refund (Reclamation)," which the bank may protest, 31 C.F.R. 240.7(a) and (c).

2. Petitioner Casa de Cambio Comdiv S.A. de C.V. was an international currency exchange, incorporated in Mexico, with its principal place of business in Mexico City. On October 29, 1993, Genaro Alvarez (Alvarez) presented to petitioner a check for $1,165,000 drawn on the United States Treasury and payable to Alvarez. Petitioner paid that amount to Alvarez and forwarded the check to its banker, Norwest Bank Minnesota, N.A. (Norwest), for deposit and collection. Norwest forwarded the check to the FRB of Minneapolis on No-

vember 1, 1993, and, three days later, the FRB debited the Treasury account and gave immediate credit for the check to Norwest. Pet. App. 3; Pet. 9; see 31 C.F.R. 240.9(a)(3)(ii) (2001). On November 5, petitioner verified that the funds were available in its Norwest account. Pet. 9.

On November 17, 1993, however, Treasury learned that checks had been stolen from the United States Postal Service Data Center in St. Louis, including a check with the same serial number as the check made payable to and cashed by Alvarez. Evidently, the check had no payee at the time it was stolen, and it was subsequently made payable to Alvarez, who endorsed it. On February 1, 1994, pursuant to 31 C.F.R. 240.3(c), Treasury directed the FRB to credit Treasury's account for the full amount of the check (see 31 C.F.R. 240.9(a)(3)(iv) (2001)). The FRB did so the same day and debited Norwest's account in a corresponding amount. Norwest subsequently debited petitioner's account. Pet. App. 3-4.

3. Almost six years later, petitioner filed suit against the United States in the Court of Federal Claims, seeking to recover the amount of the check and additional money damages. Petitioner asserted three theories of liability. Count I alleged that the government did not decline payment on the check within "a reasonable time," in violation of 31 C.F.R. 240.3(c) and (d). Count II alleged an illegal exaction without due process, and Count III alleged a taking of petitioner's property without just compensation, in violation of the Fifth Amendment. Pet. App. 4.

The Court of Federal Claims granted the government's motion to dismiss. Pet. App. 24-48. The court dismissed Count I for lack of jurisdiction because the court concluded that the Treasury regulations are "di-

rected only at protecting the Treasury's rights, rather than those of third parties." *Id.* at 30. The court reasoned that, even if Treasury had violated 31 C.F.R. 240.3(c), that provision does not provide a depositor, such as petitioner, a cause of action for the recovery of damages within the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. 30. The court dismissed petitioner's takings claim because "[i]t was Norwest and not the United States that took the action that resulted in the diminishment of the [petitioner's] funds[,] and the involvement of the United States in that transaction was not 'sufficiently direct and substantial' to make the United States liable for a taking of those funds." *Id.* at 34-35 (quoting *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 93 (1969) (see Pet. App. 31)). Similarly, the court dismissed petitioner's illegal exaction claim, because the funds at issue were recouped from petitioner by Norwest pursuant to its deposit contract with petitioner, rather than as a direct result of a statute or regulation, or at the government's behest. See *id.* at 39-42.

4. The court of appeals affirmed the district court's judgment. Pet. App. 1-23. Relying on *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), the court concluded that a presenting bank (here, Norwest) might have legal recourse against the United States, but a depositor, such as petitioner, has no claim against Treasury in the circumstances here. Pet. App. 6-8. Although the court agreed with petitioner that a claim may lie against the United States when a statute or regulation is "money-mandating" as to the plaintiff, *id.* at 8, the court rejected petitioner's arguments that the Treasury regulations are money-mandating as to petitioner. *Id.* at 9-11. The court ruled that, even if one accepted petitioner's contention that Treasury's reclamation regula-

tions (see 31 C.F.R. 240.6, 240.7) should have been applied in this case, those regulations "would only apply to claims against the government by Norwest," the presenting bank from which Treasury requested return of the funds. Pet. App. 11. The court held that the regulations "are not money-mandating as to [petitioner], since there is no indication that they were designed to convey rights on depositors of presenting banks." *Ibid.*

With respect to petitioner's takings claim, the court of appeals followed the rule set forth by this Court in *National Board of YMCA* v. *United States*, 395 U.S. at 93, which held that the Fifth Amendment requires compensation only when the "government involvement" in the deprivation of private property is "sufficiently direct and substantial." See Pet. App. 12-13. Because Norwest chose to debit petitioner's account on its own initiative, without direction or authority from the United States, the court of appeals concluded that petitioner had not stated a claim for relief under the Takings Clause. See *id.* at 16.

The court of appeals applied the same test to petitioner's due process claim that the government's action constituted an illegal exaction. Pet. App. 17-18. Because no "direct action" by the United States respecting the debiting of petitioner's Norwest account was alleged, the court held that the claim was properly dismissed. *Id.* at 18.

The court of appeals declined to address petitioner's argument that Norwest was petitioner's "agent" and therefore petitioner could itself bring any claims that Norwest might have against the United States. Pet. App. 22-23. After noting its doubts concerning the merit of that argument, the court pointed out that petitioner's complaint contained no mention of a claim

based on agency. *Id.* at 23. The court therefore held that petitioner had "waived any claim it may have against the government based on such a theory." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's arguments to the contrary are premised on a misunderstanding of the court of appeals' decision. Accordingly, this Court's review is not warranted.

1. Petitioner contends (Pet. 14-17) that the court of appeals failed to follow this Court's holdings in *Clearfield Trust*, 318 U.S. at 369, and *United States* v. *National Exch. Bank*, 270 U.S. 527, 534-535 (1926), that the United States "is not excepted from the general rule[s]" governing the rights and duties of drawees of commercial paper. Petitioner also argues (Pet. 17, 19-22) that the court of appeals misapplied 31 C.F.R. 240.3(c) because the court did not require Treasury to pay damages to petitioner for Treasury's "failure to decline the Check in a reasonable time." Pet. 17. Petitioner is mistaken in both its arguments, which are premised on a misapprehension of the analysis and the ruling of the court of appeals.

a. First, the court of appeals did not disregard the principle that the United States is subject to the general rules governing commercial paper. The court of appeals discussed *Clearfield Trust* at length and noted the factual similarities between that case and this one. See Pet. App. 6-8. For example, in both cases, checks drawn on the United States Treasury were stolen, endorsed, and cashed, and the United States subsequently took steps to obtain reimbursement. See *Clearfield Trust*, 318 U.S. at 364-365. As the court of appeals ex-

plained (Pet. App. 7), *Clearfield Trust* held that the government, as drawee, was not liable to the presenting bank because the bank had not shown that the government's delay in notifying the bank of the forgery was the cause of the bank's loss. See 318 U.S. at 370. The court of appeals reasoned that, "[a]lthough *Clearfield Trust* was a case in which the United States brought suit against the presenting bank, it is indeed difficult to believe that, where a debit has occurred, making affirmative legal action by the United States unnecessary, *the presenting bank* (here, Norwest) is without legal recourse against the United States." Pet. App. 7-8 (emphasis added). The court of appeals therefore "assume[d] that a claim for an unreasonable delay in notification may properly be brought against the United States" by the presenting bank, just as such a claim could be brought against other drawees.[1] *Id.* at 8.

The court of appeals noted, however, that this case differs from *Clearfield Trust* in a critical respect: here, a depositor (petitioner), rather than a presenting bank (Norwest), seeks to assert rights against the United States. The court found nothing in *Clearfield Trust* to suggest either that the United States could assert direct rights against a depositor, or, conversely, that a depositor could bring a direct claim against the Treasury. Instead, the depositor's claim would lie against its own bank. Pet. App. 8. Thus, the court of appeals did

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[1] There would, of course, have to be a waiver of sovereign immunity for such a claim. Petitioner, without support, erroneously asserts that the United States "acts without sovereign immunity" (Pet. 13) whenever it acts in a commercial capacity. On the contrary, it is only *after* "the United States *waives* its immunity and does business with its citizens, [that] it does so much as a party never cloaked with immunity." *Franconia Assocs.* v. *United States*, 122 S. Ct. 1993, 2001 (2002) (emphasis added).

not disregard the obligations of the United States as an "actor[] in the commercial marketplace." Pet. 16. The court simply concluded that petitioner is not the proper party to bring suit against the United States. Petitioner cites no authority to the contrary.[2]

b. Petitioner's challenge (Pet. 17, 19-22) to the court of appeals' application of the Treasury regulations also lacks merit. The court of appeals correctly stated that a claim for money damages may be asserted against the United States for violation of a regulation only if the regulation is money-mandating as to the plaintiff. Pet. App. 8 (citing *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976)). Moreover, the regulation must confer a right to payment expressly and with specificity. *Id.* at 9; see *Testan*, 424 U.S. at 399-400. Petitioner has not identified any regulation that expressly and specifically gives petitioner a right to money damages.[3]

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[2] Petitioner also contends that the court of appeals "assumed incorrectly that the check here bore a forged endorsement, whereas in fact it was a forged check stolen from the United States that bore a correct endorsement." Pet. 15; see Pet. 12, 19. Whether or not petitioner is correct, the distinction between a forged check and a forged endorsement is of no consequence to the court's ruling on who can bring suit against the United States.

[3] Although the petition contains (Pet. 15-16, 19, 21) numerous references to the Uniform Commercial Code (UCC), petitioner effectively acknowledges (see Pet. 16), as it must, that Treasury's Part 240 regulations—not the UCC—govern the payment of checks drawn on the United States Treasury. See *Clearfield Trust*, 318 U.S. at 366 ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."). The petition's references (Pet. 3-4, 18) to proposed amendments to the Treasury regulations are also irrelevant to the questions presented by the petition. The proposed amendments did not address the question decided by the court of appeals—whether the depositor of a check may maintain a dam-

Petitioner argues (Pet. 20) that Treasury's "reasonable time to make such examination" regulation, 31 C.F.R. 240.3(c), "can be fairly interpreted as mandating compensation by the United States for the damages sustained" by petitioner. Alternatively, petitioner argues (Pet. 20, 22) that the government should have followed the reclamation process set forth in 31 C.F.R. 240.6 and 240.7, which, in petitioner's view, is likewise money-mandating. Neither regulation provides petitioner a basis for relief.

As the Court of Federal Claims concluded, the Part 240 regulations are "directed only at protecting the Treasury's rights, rather than those of third parties." Pet. App. 30. The regulations make no mention of providing compensation to anyone for a violation. Indeed, petitioner conceded as much in the trial court. See *ibid.* Section 240.3(c) not only makes no reference to the payment of any money, but, as the Court of Federal Claims noted, it does not "so much as mention depositors, depository institutions or presenting banks." *Ibid.*

The reclamation regulations, 31 C.F.R. 240.6, 240.7, provide for a process under which the government may seek reimbursement after it has failed to reject a check on first examination and the check "has been paid." 31 C.F.R. 240.6(a). That process includes notice and an opportunity for the presenting bank to file a protest. See Pet. App. 11 (discussing regulations). The regulations do not, however, provide anyone a right to compensation if Treasury fails to comply with them.

Moreover, the reclamation regulations were not applicable here. Treasury rejected the check on first examination under 31 C.F.R. 240.3(c) before the check

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ages claim against the government. See 60 Fed. Reg. 48,940 (1995); 62 Fed. Reg. 29,314 (1997).

was "deemed" to have been "paid" under 31 C.F.R. 240.3(d). Therefore, Treasury's efforts to regain the funds were governed by 31 C.F.R. 240.3(c) and 240.9(a)(3)(iv) (2001), rather than the reclamation regulations, which by their terms apply only to a check that "has been paid." 31 C.F.R. 240.6(a).[4]

In any event, the court of appeals did not base its dismissal of petitioner's claim on the conclusion that the Treasury regulations are not money-mandating. Rather, the court held that, even assuming that the regulations *are* money-mandating, they "are not money-mandating *as to [petitioner,]* since there is no indication that they were designed to convey rights on depositors of presenting banks." Pet. App. 11 (emphasis added). Thus, as explained above in the discussion of *Clearfield Trust*, the actual holding of the court of appeals was only that petitioner is the wrong party to

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[4] Petitioner erroneously asserts that "final payment" had been made so that Treasury could seek recovery of the funds in question only by reclamation. Pet. 20; see Pet. 22. Under 31 C.F.R. 240.9(a)(3)(ii) (2001), the FRB must "[g]ive immediate credit" for checks, but that credit is explicitly made "subject to examination and payment" by the Treasury. Section 240.3(c) gives Treasury the right to examine checks and to refuse payment within a reasonable time, and, as noted in the text above, Section 240.3(d) provides that checks are "deemed to be paid" by Treasury "only after first examination has been fully completed." That examination was completed in this case on February 1, 1994, when Treasury advised the FRB that it was refusing payment and directed the FRB to reverse the previous charge to Treasury's account by giving it an "immediate credit therefor," as 31 C.F.R. 240.9(a)(3)(iv) (2001) requires. Thus, under the regulations—and contrary to petitioner's contention—there was no "final payment."

present a claim for money damages based on the government's alleged violation of Treasury's regulations.[5]

Petitioner offers little argument or authority in challenging that holding. Petitioner cites (Pet. 18) *ABN Amro Bank, N.V.* v. *United States*, 34 Fed. Cl. 126 (1995), but the Court of Federal Claims in that case did not address the question whether the Treasury regulations at issue here are money-mandating with respect to a depositor. In any event, as the court of appeals explained (Pet. App. 18 n.1), a decision by the Court of Federal Claims is not binding on the Federal Circuit. Rather, the Federal Circuit's decision binds the Court of Federal Claims. Thus, to the extent *ABN Amro* is inconsistent with the decision of the court of appeals in this case, *ABN Amro* is no longer of continuing validity.

Although petitioner repeatedly states that it "must be viewed as being within the ambit of the protections afforded by the Treasury's Part 240 regulations" (Pet. 19; see Pet. 21), petitioner does not support that *ipse dixit* with any explanation. Similarly, petitioner claims that, "[u]nder this Court's precedents and Part 240, there is no basis for concluding that the Treasury's obligation to provide compensation for a violation of its regulations is limited to a presenting bank," Pet. 21, but petitioner fails to identify any authority supporting its contention.[6]

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[5] The question whether Treasury declined payment within a "reasonable time" was therefore not reached by the court of appeals and is not before this Court.

[6] Petitioner cites the reclamation regulation in support of its argument that "Treasury's obligations * * * are not limited to presenting banks." Pet. 22. As petitioner notes, that provision states that a refund request is sent "to the presenting bank or any other indorser." 31 C.F.R. 240.7(a). However, petitioner concedes

2. Petitioner contends (Pet. 22-24) that this Court's review is warranted because the court of appeals' ruling on its taking claim and its illegal exaction due process claim "continue[s] a split among the circuits on [an] important question of federal law." Pet. 22. Contrary to that contention, the decision of the court of appeals does not conflict with the decision of any other court of appeals.

Relying on *National Board of YMCA* v. *United States*, 395 U.S. 85, 93 (1969), the court of appeals rejected both claims because the loss that petitioner suffered resulted from the debiting of its account by Norwest without any "direct and substantial" involvement of the United States. See Pet. App. 11-18. Petitioner does not challenge the court's reliance on *YMCA* or its analysis. Indeed, petitioner does not even cite *YMCA*.

Instead, petitioner argues that the Court should use this case to resolve a purported conflict among the courts of appeals. See Pet. 23-24 (citing *Alnor Check Cashing* v. *Katz*, 11 F.3d 27 (3d Cir. 1993); *Breault* v. *Heckler*, 763 F.2d 62 (2d Cir. 1985); *Dockstader* v. *Miller*, 719 F.2d 327 (10th Cir. 1983), cert. denied, 467 U.S. 1256 (1984); and *Powderly* v. *Schweiker*, 704 F.2d 1092 (9th Cir. 1983)). This case does not, however, implicate the alleged conflict identified by petitioner. Although the court of appeals found the cases cited by petitioner instructive (see Pet. App. 19-22), none of the cases involves the type of claims at issue here—a takings claim and a claim for money damages based on an alleged illegal exaction in violation of due process. The claim in *Alnor* was based solely on the Treasury regulations, and the claims in *Breault*, *Dockstader* and *Pow-*

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that "Treasury did not avail itself of this procedure, * * * because it was inapplicable." Pet. 20. See pp. 10-11 & n.4, *supra*.

derly were procedural due process claims based on lack of notice and an opportunity to be heard rather than substantive claims for money damages. Thus, even if those cases give rise to a conflict, this case does not present an appropriate vehicle to resolve that conflict.

Petitioner does not contend that the decision here conflicts with *Alnor*, *Dockstader*, or *Powderly*, because the courts in all of those cases rejected the claims asserted against the government. Although the court in *Breault* ruled that the claim in that case could go forward, petitioner's suggestion (Pet. 23) that the ruling here conflicts with *Breault* is wide of the mark. *Breault* involved a claim that recipients of Social Security benefits were entitled to notice and a hearing before the government could require their banks to refund payments that Treasury had erroneously made to the banks as benefits on their behalf. 763 F.2d at 63. The recipients did not claim that they were entitled to damages or to a refund of the benefits; the court acknowledged that the payments that were recouped from the named plaintiffs had indeed been erroneously made. *Id.* at 65. The court held only that the government's role in the debiting of the accounts was sufficient state action to support a procedural due process claim. *Id.* at 63-65. That holding is quite different from the holding of the court of appeals in this case that the government's conduct here was not "direct and substantial" enough to constitute an "illegal exaction" or a taking that gives rise to a claim for money damages against the government. See Pet. App. 17 (explaining that "there is no jurisdiction under the Tucker Act over a Due Process claim unless it constitutes an illegal exaction" and that "[a]n illegal exaction under the Due Process clause exists only if money has been 'improperly exacted or re-

tained' by the government" (quoting *Testan*, 424 U.S. at 401)).

3. Petitioner also errs in contending (Pet. 24-28) that the court of appeals improperly adopted a heightened pleading rule. The court of appeals did not adopt any new pleading rule. Its case-specific ruling that petitioner waived the claim that Norwest was petitioner's agent is correct and does not warrant this Court's review.

The court correctly noted (and petitioner does not dispute) that "[n]o mention of [the agency] theory appears in [petitioner's] complaint." Pet. App. 23. The court of appeals thus correctly held that petitioner had "waived" any such claim. *Ibid.* As petitioner acknowledges, even under the "simplified notice pleading" followed in the federal courts, a complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). A complaint that makes no mention of any cause of action or claim based on an agency or subrogation theory fails to provide "fair notice" to the defendant and thus fails to satisfy even the most liberal pleading standards.

Even if the complaint could reasonably be construed to encompass petitioner's agency/subrogation theory, petitioner conceded, in response to questioning by the Court of Federal Claims, that it never raised or addressed that claim anywhere in its briefs. C.A. App. 72. The trial court therefore declined to address the issue. See *ibid.* In those circumstances, the court of appeals also properly refused to consider the claim. Cf. *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (Court does not ordinarily decide "questions neither raised nor resolved below").

In sum, the theme that runs through the decision below is that petitioner advanced claims that, to the extent they were valid at all, properly belonged to Norwest, the presenting bank. Petitioner's inability to assert those claims, in turn, largely results from the court of appeals' case-specific holding of waiver. That fact-bound determination does not merit plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. AND THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a holder in due course of a Treasury check is entitled to recovery where the Treasury has acted in a manner that is contrary to commercial practices to which it is obligated to conform as modified by Treasury regulations, and that would undermine the normal processes for the negotiation of Treasury checks and make Treasury checks unreliable.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. AND THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

With the consent of the parties, The New York Clearing House Association L.L.C. (the "Clearing House") and the American Bankers Association (the "ABA") submit this brief as *amici curiae* in support of Casa de Cambio Comdiv S.A. de C.V.'s ("Casa") Petition for Writ of Certiorari ("Petition") for review of the opinion of the Court of Appeals reported at 291 F.3d 1356 (Fed. Cir. 2002) ("Federal Circuit Opinion").[1]

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amici curiae* make any monetary contribution to the preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICI*

The Clearing House is an association of leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House regularly appears as *amicus curiae* before appellate courts in cases that raise significant legal issues relating to banking and in particular in cases, like this one, that raise important questions concerning rules governing national and international payment systems.

The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The Federal Circuit Opinion for which review is sought precludes parties, who in good faith take a Treasury check for value, from obtaining a remedy when the Treasury refuses to comply with applicable law and regulations concerning its ultimate payment of such a check. The resulting unenforceability of the Treasury's obligation to pay or return its own checks will impair the efficiency and reliability of the banking system in which the amici's members participate, because every day they must make millions of dollars of funds available to customers based on their own prompt and effective decisions about whether to honor such checks.

Casa received and in good faith gave value for a forged Treasury check in the amount of $1,165,000 on October 29,

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[2] The members of the Clearing House are Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

1993, deposited the check in its account at Norwest Bank, Minnesota, N.A. ("Norwest") and instructed Norwest to forward the check for collection.[3] As Casa's agent, *see* U.C.C. § 4-201(a),[4] and as an intermediary in the collection process, Norwest presented the check to the Federal Reserve Bank of Minnesota, the Treasury's fiscal agent, for payment on Casa's behalf. The Federal Reserve Bank gave credit to Norwest for the check on November 4, 1993. On November 17, 1993, the Treasury identified the check as stolen, but did not provide any notification to Casa or Norwest. Nor did the Treasury direct the Federal Reserve Bank to reverse the credit it had given to Norwest for the check until February 1, 1994, three months after the check was presented and 75 days after the Treasury knew that the check had been stolen. (App. 26). Also on February 1, 1994, the Federal Reserve Bank debited Norwest's account with the Federal Reserve Bank and, as Casa's intermediary and transferee, Norwest then debited Casa's account with Norwest for the full amount of the check. *Id.* As of February, 1994, Casa thus suffered a loss.

Revoking payment in such a tardy fashion is contrary to long-standing commercial practice, as well as the Treasury's own regulations, *see* 31 C.F.R. §§ 240.3(c), 240.6. When Casa sued in the Court of Federal Claims, however, the court ruled that the damage suffered by Casa was only "indirect" and therefore that Casa lacked standing to bring suit against

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[3] Because the Federal Circuit Opinion affirmed an order granting a motion to dismiss Casa's complaint, the court presumed that Casa's factual allegations, including taking the check in good faith for value, were true.

[4] For ease of convenience, we refer throughout to the Uniform Commercial Code as the "U.C.C." References to "U.C.C. § 3-___" and "U.C.C. § 4-___" are to sections of Revised Article 3 and Amended Article 4 of the Uniform Commercial Code as they appear in volumes 2 and 2B, respectively, of the Uniform Laws Annotated (West 1991).

the Treasury. Although it believed that Norwest had legal recourse against the United States, 291 F.3d at 1359-60, the Federal Circuit nonetheless affirmed, concluding that a claim against the Treasury could be brought only by the presenting bank—here Norwest, Casa's agent—which suffered no loss because it merely passed on the reversal of payment to its principal, Casa. This decision is plainly inconsistent with precedent governing the use of Treasury checks and, if permitted to stand, will allow the U.S. Treasury to impose significant losses on private parties by failing to act with reasonable promptness.[5]

The Clearing House and ABA banks have a substantial interest in the question presented in this case. "[C]heck volume is still increasing by an estimated 2 percent per year and is now at an annual level of about 70 billion items." Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* (hereinafter, "Clark"), Volume I, ¶ 1.06[2] at 1-49 (2002). Their widespread use, however, in conjunction with rapidly-evolving computer and copying technology, has

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[5] There also is an inconsistency in the Federal Circuit Opinion. Either Norwest still was Casa's agent or the Treasury's payment was final and a reclamation procedure was its only remedy. The Treasury is entitled to review a check and decline payment within a reasonable time, 31 C.F.R. § 240.3(c); during this period a collecting bank such as Norwest is acting as the agent of the check's owner, such as Casa. U.C.C. § 4-201(a). That agency terminates once a settlement becomes final, *id.*, and at that point the Treasury's remedy upon discovering that a check contains a forged indorsement or another material defect or alteration is a reclamation procedure which involves notice and protest. 31 C.F.R. § 240.6. The Court of Federal Claims stated clearly, however, that here reclamation "is inapplicable" (App. 27). Under state law principles, therefore, if settlement was not final, Norwest still was Casa's agent, U.C.C. § 4-201, and it was Casa which was entitled to sue for its loss. Comment 4 to U.C.C. § 4-201 recognizes that the depositor, as owner of the check being collected, has "the direct rights of Section 4-302 [establishing a midnight deadline rule for private sector banks] against the payor bank."

resulted in a "dramatic increase in check forgeries in recent years." *Id.*, Section 10.01[2] at 10-1.

Because it purports to deny recovery to the actual victim of the Treasury's actions, the Federal Circuit Opinion constitutes a direct assault on long-standing, well-reasoned loss allocation principles concerning forged checks, and forged Treasury checks in particular. The Clearing House and the ABA are concerned that the Federal Circuit Opinion will upset the accepted commercial practice concerning forged checks and interfere with the certainty and reliability of Treasury checks and, thus, their commercial usefulness. *See ABN Amro Bank N.V.* v. *United States*, 34 Fed. Cl. 126, 132 (1995) (rejecting "argument [that] would result in . . . a . . . fundamental change . . . with respect to the apportionment of risk among banks handling Treasury checks."). Although the Treasury is intended, by this Court's mandate, to stand in the position of "any other drawee," *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943), the Federal Circuit Opinion, without recognizing that it has undermined the dependability of Treasury checks, threatens to provide the Treasury with an unwarranted advantage at the expense of other financial institutions.[6]

STATEMENT OF THE CASE

Casa seeks review of an order of the Federal Circuit that affirmed the Court of Federal Claims' dismissal of Casa's complaint. Casa sought to recover on three separate theories. Count I alleged that the Treasury violated 31 C.F.R.

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[6] The Federal Circuit Opinion acknowledged that there was a split among the Courts of Appeals in analogous circumstances as to whether a depositor had a claim against the United States. 291 F.3d at 1364-66. Even without such a conflict, this Court should exercise its discretion to grant review in this case because the decision of the lower court has "so far departed from the accepted and usual course of judicial proceedings" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Sup. Ct. R. 10(a), (c)).

§ 240 because it did not reject payment of the check within a "reasonable time." Count II alleged an illegal exaction without due process in violation of the Fifth Amendment. Count III alleged the government had taken Casa's property without just compensation as guaranteed by the Fifth Amendment.

The Court of Federal Claims dismissed each cause of action. As to Count I, the court held that it lacked jurisdiction because, even if the government had violated Section 240, "nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either 'expressly or by implication.'" 291 F.3d at 1358. The court dismissed Count II (the Due Process claim) and Count III (the Takings claim) on the basis that Norwest and not the United States took the action that harmed Casa, and the involvement of the United States was not 'sufficiently direct and substantial' to make the United States liable for a taking of those funds. *Id.*

On appeal, the Federal Circuit affirmed as to each count. Ignoring the reality that Norwest, as Casa's agent entitled to recover from its depositor, suffered no injury, the Federal Circuit asserted that only Norwest, as the presenting bank, could have a claim against the Treasury under each of the causes alleged by Casa. *See* 291 F.3d at 1359, 1361, 1363. The court declined to hold that Casa, the actually injured party, could state a claim under any of these theories because the Treasury's actions purportedly did not affect Casa directly.

The petition followed.

SUMMARY OF ARGUMENT

To deal fairly and efficiently with check forgeries, states have established certain well-settled principles, either through common law or adoption of the Uniform Commercial Code, to (a) encourage efficient decision-making on whether to pay

or return checks while (b) fairly allocating losses resulting from check forgeries. Chief among these principles are (i) that a drawee bank must pay or return a check to a presenting bank by a "midnight deadline" and (ii) as derived from the long-honored doctrine of *Price* v. *Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (1762), that when a check with a forged drawer's signature is mistakenly paid by the drawee bank to the presenting bank, the risk of loss for the payment falls on the drawee bank and not the holder of the check. The Clearing House and ABA banks depend and rely on these principles, and live with their consequences equally whether benefiting as collecting or presenting banks, or suffering as drawee banks.

The Treasury, as a major participant in commercial transactions, also operates under these same principles with only minor variations. *Clearfield Trust*, 318 U.S. at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee."). Treasury regulations modify these principles so that the midnight deadline imposed on commercial banks becomes a "reasonable time" for the Treasury.[7] The long-standing loss-allocation laws embodied as federal law in Section 240 have the significant purpose of ensuring the ready negotiability of the Treasury's checks and advancing the important policy of assigning loss, as under state law, based upon the relative responsibility of the parties. *See Getty Petroleum Corp.* v. *American Express Travel Related Services Co.*, 90 N.Y.2d 322, 326 (1997) (noting that the U.C.C. "accomplishes these ends by establishing commercially sound rules designed to

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[7] Under 31 C.F.R. § 240.3(c), the "Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks [and] shall have a reasonable time to make such examination." *See United States* v. *Chase Nat. Bank*, 252 U.S. 485 (1920) (check held to have been deemed paid by Treasury because it was not returned after two weeks).

place the risk of loss attributable to fraud . . . with the party best able to prevent [the loss].").[8]

Notwithstanding these time-honored principles, its own regulations and the sound policies supporting them, the Treasury in this case attempted—and has thus far succeeded in its effort—to recover a payment it made on a forged check long after it had made a settlement on that check and well after any "reasonable time" to revoke the settlement or decline payment had expired. Specifically, months after Casa gave value in good faith for the forged Treasury check, forwarded it to its U.S banker and agent, Norwest, for deposit and collection, and received credit for the check via Norwest, the Treasury directed that Norwest's account with the Federal Reserve Bank be debited for the full amount of the check. Casa is the victim of and real party in interest in the Treasury's belated reversal. Norwest, as Casa's agent and a transferee of the Treasury check directed to collect funds from the Treasury, was entitled to and did in fact debit the full amount of the check from Casa's account with Norwest. Notwithstanding that Norwest was made whole and Casa was left holding the bag that the Treasury had emptied, the Federal Circuit affirmed the dismissal of Casa's case on the theory that only the presenting bank had standing to sue the Treasury in these circumstances.[9]

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[8] Although the U.C.C. as a whole has not been adopted as part of federal law, this Court has recognized that "businessmen depend on state commercial law to provide [essential] stability" and has adopted U.C.C. principles as the federal rule of decision where appropriate. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 739-740 (1979).

[9] The Federal Circuit did conclude that *someone* had a cause of action against the Treasury. 291 F.3d at 1359-60 ("[I]t is indeed difficult to believe that, where a debit has occurred, making legal action by the United States unnecessary, the presenting bank (here, Norwest) is without legal recourse against the United States. . . . [W]e assume that a claim for unreasonable delay in notification may properly be brought against the United States."). Thus, the Federal Circuit to this extent recognized the

The Federal Circuit Opinion plainly upsets existing loss-allocation principles in every case where there are multiple institutions involved in the collection process of a Treasury check because it limits *who* may bring a claim for a violation of Section 240. Specifically, and notwithstanding the likelihood that the Treasury had violated Section 240, the Federal Circuit affirmed the Court of Federal Claims' ruling that "nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either expressly or by implication." 291 F.3d at 1358. The courts below ignored settled commercial principles that give Casa that right, and that apply these principles to the Treasury as drawee. *Clearfield Trust*, 318 U.S. at 369. Because the presenting bank (Norwest) has been and was entitled to be made whole by debiting the account of its depositor, it has neither the incentive nor the standing to bring an action. Because the Federal Circuit Opinion incorrectly holds that an uninjured agent has standing but the injured principal does not, it effectively eliminates actions against the Treasury to recover for delayed reversals of payments on its checks.

This holding is unprecedented and displays a considerable misunderstanding of the process of collection and settlement of negotiable instruments, which must be examined and honored expeditiously to maintain their usefulness. The opinion also runs counter to a long line of decisions that are thoroughly analyzed in a recent ruling of the Court of Federal Claims under similar circumstances. In *ABN Amro*, the Court of Federal Claims addressed the claims of a holder in due course of a Treasury check who, like Casa, in good faith gave value for the check, submitted it to another bank for presentment to the Treasury, received credit for the check through the intermediary presenting bank, and then suffered

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settled law of *Price* v. *Neal* and Section 240 and *did not* hold that Section 240 exists solely for the protection of the Treasury.

the Treasury's belated reversal of credit, as here, through the intermediary presenting bank. In its extensive analysis, the court nowhere acknowledged any standing issue, and ultimately determined that ABN Amro could proceed with its action alleging, *inter alia*, violation of 31 C.F.R. § 240.3(c) and violations of the due process and takings provisions of the U.S. Constitution.[10]

As in this case, a party other than the presenting bank often is the ultimate victim—and suffers the "injury in fact" traditionally sufficient to convey standing—of an attempt by the Treasury to avoid the requirements of Section 240. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[P]laintiff must have suffered an 'injury in fact' . . . which is concrete or particularized"); *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (individual standing requires an "actual injury redressable by the court"). That victimization is entirely predictable because it is clear from the moment the Treasury seeks belatedly to recover a payment on a forged check that *someone*—someone besides the Treasury—will suffer a loss and should have standing to challenge the Treasury's action. *Cf. Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976) (requiring, for standing, that an injury be "fairly . . .

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[10] The reason that the *ABN Amro* court identified no standing issue is because a depositor's right to the funds credited to it as a result of the Treasury's payment on a forged check does not derive from and is not preempted by the Treasury regulations. Under basic banking principles, *see* U.C.C. § 4-201 and comment 4 thereto, Norwest was acting as Casa's agent in presenting the check for collection on Casa's behalf. Casa therefore stood in the shoes of Norwest when Norwest's account was debited by the Treasury; although the debit was facially imposed on Norwest, the loss actually was borne by Casa, which was bound as principal to reimburse Norwest. As principal and payer of the debit, Casa should be entitled to maintain the claims against the United States.

trace[able] to the challenged action of the defendant"); *Lujan*, 504 U.S. at 560 (same).[11]

Further, the Federal Circuit Opinion's deviation from this Court's requirement that the Treasury be treated like other drawees is bad policy because the "present banking system under which an enormous number of checks are processed daily could not function effectively if banks"—and the Treasury—"were not required to make prompt and effective decisions on whether to pay or dishonor checks." *Town & Country State Bank of Newport* v. *First State Bank of St. Paul*, 358 N.W. 2d 387, 395 (Minn. 1984). Were the Federal Circuit Opinion to stand, all commercial banks would be faced with a no-win dilemma regarding their treatment of Treasury checks. If they cash the checks and, as they are required, make the funds available for that check on the next or the following business day, 12 C.F.R. §§ 229.10(c)(1)(i), 229.12(b)(2), the collecting bank is potentially subject to reversal of payment for months under the Federal Circuit Opinion.

For these reasons, the *amici* respectfully request that Casa's Petition be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT OPINION EFFECTIVELY ELIMINATES ACTIONS AGAINST THE TREASURY FOR ITS VIOLATIONS OF LONG-STANDING LOSS ALLOCATION AND AGENCY PRINCIPLES REGARDING FORGED CHECKS.

To encourage banks to expedite check processing, and to provide certainty for banks seeking to determine their exposure when cashing checks for their depositors, U.S.

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[11] If the Treasury instead acts quickly, prompt notification that a check is stolen increases the potential of avoiding a loss by any innocent party.

legislatures and courts have adopted two rules relevant to this matter which act together effectively and fairly to allocate loss among banks for forged checks: *First*, banks are subject to a "midnight deadline" rule. Pursuant to this rule, when a drawee bank is presented with a check for payment, it must complete an examination of the check for payment or dishonor by midnight of the first business day after presentment. *See* U.C.C. §§ 4-301(a), 4-215(a)(3). *Second*, banks are subject to a final payment rule. That is, as first stated in *Price* v. *Neal*, a core concept in the payments system is that where a forged check is mistakenly paid by the drawee bank to the presenting bank, the risk of loss for the forgery generally falls on the drawee bank. *See* U.C.C. § 3-418.

The principles underlying these loss allocation provisions are sound and time-honored. The drawee bank generally will be in a superior position to determine the genuineness of a check and of the drawer's signature, whereas collecting banks typically will have no knowledge of a forged drawer's signature until they hear about it from the drawee bank. It is appropriate, therefore, that the drawee bank, as opposed to the collecting bank or the depositor, should bear the risk of a mistaken payment.[12] Further, the final payment provision ensures that there is no danger that a series of commercial transactions will need to be reopened or reversed. *See, e.g.*, *ABN Amro*, 34 Fed. Cl. at 133 ("Because it would permit Treasury, after a delay, to reopen and upset a series of prior bank transactions, defendant's interpretation would create additional indefiniteness in the banking system as to liability."). The rule thus permits banks to make funds available to their depositors with some reasonable assurance that they will not be required to recover the funds from the depositor. Finally, because the final payment rule as between collecting

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[12] Similarly, in this case the Treasury was in the best position to know that the check at issue had been stolen and that the drawer's signature was unauthorized.

and drawee banks is not negligence-based, once final payment has been made, banks need not waste time, money or energy arguing about the cleverness of a forgery. That is, provided that the collecting bank took the check in good faith and for value or in good faith changed its position in reliance on the payment for the check, the drawee bank is responsible for the loss regardless of whether a reasonable bank arguably would have detected the fraud. A bright-line rule reduces disputes and permits banks more effectively to plan for risk of loss.

Owing to the soundness of these loss allocation provisions, this Court has recognized that the Treasury, to the extent it wishes to participate freely in commercial transactions with private banks, is subject to the same rules. *Clearfield Trust*, 318 U.S. at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee."). *See also* Clark, Section 10.10[1] at 10-193 ("[A] double standard flies in the face of Supreme Court cases like *Clearfield Trust Co. v. United States*, where Justice Douglas emphasized that Treasury should generally be held liable to the standards of commercial banks in handling negotiable instruments.").

Accordingly, the Treasury's regulations incorporate the *Price* v. *Neal* rule with only slight variation. 31 C.F.R. § 240.3(c) ("The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks [and] shall have a reasonable time to make such examination."); 12 C.F.R. § 229.10(c)(1)(i) (depositary bank to make funds available for withdrawal not later than next business day after day of deposit of Treasury check into payee's account), 12 C.F.R. § 229.12(b)(2) (second business day availability after other deposits of Treasury checks). "The plain language of the regulations indicates that there is no blanket government immunity in this area; instead, the principles governing payment of U.S. Treasury checks is a close variation of the finality doctrine of *Price* v. *Neal*."

Clark, Section 10.10[1] at 10-192. *See also United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Trust*, 318 U.S. at 369.

Although the Federal Circuit recognized this settled law, *see supra* at n.9, its affirmation of the Court of Federal Claim's decision has the actual effect of rejecting it, by limiting who may bring a claim for improper rejection of a Treasury check. This limitation, if permitted to stand, would constitute a significant, unwarranted and unprecedented departure from traditional commercial practice for several reasons.

First, the court's holding that even if the government had violated Section 240, those regulations were "directed only at protecting the Treasury's rights, rather than those of third parties . . . [and] nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either expressly or by implication," 291 F.3d at 1358, ignores the fundamental legal relationship of a depositor (like Casa) and the depository and collecting bank (like Norwest). It is axiomatic that a collecting bank is normally the agent of the depositor with respect to checks deposited for collection. To that end, the U.C.C. specifically provides that

> "Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement for the item is provisional. . . . If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this Article apply even though the action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it."

U.C.C. § 4-201(a).

Here, the Federal Circuit Opinion would perpetuate the faulty fundamental premise of the opinion of the Court of Federal Claims, *i.e.*, its assumption that Casa "had a remedy [against Norwest], but chose not to pursue it." (App. 48). Based on this faulty assumption, the Court of Federal Claims suggested that Casa could have sued Norwest, which in turn could have "interpled" the Treasury. (App. 39-40). In such case, the court suggested that the challenged violation of the regulations would have been properly before the court.

In fact, Casa has no claim against Norwest. Norwest was acting as Casa's agent in presenting the check for collection on Casa's behalf. When the Treasury ordered the debit of the check, it was a loss actually imposed on and borne by Casa. Norwest was entitled to reimbursement from Casa pursuant to U.C.C. §§ 4-207 and 3-416, which require a transferor of a check to give certain warranties to his transferee and subsequent holders (but not the drawee), including that all signatures, including the drawer's, are "genuine and authorized." *Id.* Because Casa, albeit unknowingly, breached these warranties, Norwest was entitled to debit Casa's account. Therefore, as principal and payer of the debit, Casa has a direct claim against the United States. *See* U.C.C. § 4-201 and comment 4 thereto. Consequently, this case is not about faulty pleading, but fundamental rights.

Second, the Federal Circuit Opinion runs directly counter to traditional standing analysis where the power to sue is naturally bestowed on the party that suffered the loss, here Casa, the depositor with the presenting bank. The lower courts in this matter have decreed instead that suit may be brought only by Norwest, the presenting bank, which suffered no loss. Why would an uninjured presenting bank sue and why should a court entertain such a suit? The Court of Federal Claims' answer that Casa should have sued Norwest, which then "would have interpled the United States" (App. 39-40), not only is unnecessarily complex, but is legally

unsustainable.[13] What legitimate claim does Casa have against Norwest? If it has none, as we believe is the case, then the question of the Treasury's liability is never reached, and the judicial system is unduly burdened by needless litigation. Suppose as well that the depositary bank is not a member of the Federal Reserve System. Would the solution then be for the depositor to sue its bank, which then would sue the presenting bank (a member of the Federal Reserve system), which then would attempt to sue the United States?

Third, to the extent that there exists any precedent on this issue, the Court of Federal Claims previously did acknowledge, albeit implicitly in analogous circumstances, that a depositor *is* entitled to pursue an action directly against the Treasury. In *ABN Amro*, the plaintiff, ABN Amro, sued the Treasury for damages suffered from an unauthorized reversal of a credit for a Treasury check cashed by the plaintiff but submitted to the Treasury for payment by an intermediary presenting bank. Although the case concerned a double forgery—*i.e.*, a forged check with a forged indorsement—the court's rationale applies with equal force here. At bottom, "Defendant's interpretation would supersede the result in *Price* because . . . the responsibility for the loss would generally be placed on the depository bank notwithstanding the fact that Treasury was the drawee on the check and seemingly in a far superior position than the depository bank to identify a forged drawer signature." 34 Fed. Cl. at 132-33. Accordingly, ABN Amro was permitted to pursue an action against the Treasury regardless of the fact that a different bank had presented the check to the Treasury for payment.

In short, the Federal Circuit Opinion, without precedent, provides the Treasury with an unjustified dispensation and upsets the long-standing policy objectives of processing

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[13] The putative lawsuit by Casa against Norwest would not have been filed in the Court of Federal Claims, the only court in which a claim of this magnitude against the Treasury could be filed. 28 U.S.C. § 1491.

checks efficiently and allocating fairly losses due to check forgeries. Well-established loss-allocation laws have the valuable purpose of ensuring the ready negotiability of commercial paper and advance the important policy of assigning loss based upon the relative ability to prevent the loss. The U.C.C. and the Treasury regulations "accomplish[] these ends by establishing commercially sound rules designed to place the risk of loss attributable to fraud . . . with the party best able to prevent [the loss]." *Getty Petroleum Corp.* v. *American Express Travel Related Services Co.*, 90 N.Y.2d 322, 326 (1997). The Federal Circuit Opinion, without explanation, would upset this balance. Review therefore is warranted.

II. THE PETITION ALSO SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT OPINION WILL DRAMATICALLY ALTER COMMERCIAL BANKING PRACTICE

The Federal Circuit Opinion cannot be correct as a matter of law. The idea that only the presenting bank has standing to challenge the Treasury's late recovery of payment on a forged check is not consistent with standing principles. Standing is conferred on persons who suffered actual, foreseeable injury. *See, e.g., Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[P]laintiff must have suffered an 'injury in fact' . . . which is concrete or particularized" and "fairly . . . trace[able] to the challenged action of the defendant"). It is uncontested that Casa is that party here, and that the Treasury's actions had the natural and predictable consequence of injury to Casa. Moreover, because in many cases, including this one, the absence of injury to the presenting bank precludes standing for it, the inevitable consequence of the Federal Circuit Opinion is that the Treasury is immunized from its violation because no standing exists for anyone.

Further, the law on which the Treasury regulations are based expressly contemplates that check-processing encom-

passes a series of transactions and that the final payment of a check should not be reversed because it would upset each of those transactions. Thus, Comment 1 to N.Y. U.C.C. § 3-418 notes that "it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered." *See United States* v. *Kimbell Foods*, 440 U.S. at 729 (declining to establish a distinct federal rule whose application "would disrupt commercial relationships predicated on state law"); *ABN Amro*, 34 Fed. Cl. at 133 (declining to adopt Treasury's position which "would create additional indefiniteness in the banking system as to liability"). Plainly, the law contemplates that more than one bank may be harmed by the Treasury's attempt to recover amounts paid on a check, and thus foresees recovery by the party that bears the loss. Thus, to the extent the regulations potentially confer standing on the presenting bank, they cannot reasonably be interpreted otherwise as to upstream banks or the depositor who has suffered the loss.

The Federal Circuit Opinion also cannot be correct as a matter of policy. It enables the Treasury to escape the consequences of its error and to impose those consequences on an innocent party. In order to avoid this result in the future, banks would be required to alter their processing of Treasury checks, so that the depositary bank maintains a right of action against the presenting bank. This would destroy the very uniformity that the Treasury's regulations are designed to create and result in two inconsistent side-by-side systems for check collections.

Even then, the ultimate result would be the replacement of a finality rule with a steady stream of litigation, an outcome incompatible with the desired negotiability of Treasury checks. Each forged check would represent another lawsuit, placing a burden on the courts, the banking system and the

Treasury alike. It is difficult to imagine why it is desirable to replace a well-established rule of law that promotes ease and efficiency with constant litigation.

Finally, this new "no-standing" rule will have an adverse effect on the utility of Treasury checks. The principal benefit of Treasury checks is that they are dependable, and not only as to creditworthiness. Federal regulations require that funds be made available on the business day or two following the banking day of deposit for Treasury checks. *See* 12 C.F.R. § 229.10(c)(1)(i), 229.12(b)(2). The ruling below creates potential obstacles to collection that make Treasury checks less attractive. For these and like reasons, the Court of Federal Claims has acknowledged that the Treasury itself likely did not intend to change established law through its regulations. *See ABN Amro*, 34 Fed. Cl. at 133 ("[I]t would be expected that had Treasury intended to adopt regulations that would modify *Price* and significantly change the apportionment of risk between Treasury and depository banks, Treasury would have made that intention evident."). Yet this is what the Federal Circuit now has done.

CONCLUSION

The Federal Circuit Opinion, if permitted to stand, would significantly alter banking practice and, in particular, the treatment, reliability and usefulness of Treasury checks. Because the opinion destroys the certainty and predictability provided by previous jurisprudence, and its legal analysis is in error, the decision warrants review and, ultimately, reversal.

Respectfully submitted,

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In The
Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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U.C.C. § 4-201(a).....4

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U.C.C. § 4-207(c).....5

Petitioner Casa de Cambio S.A. de C.V. ("Casa") respectfully files this reply brief in support of its petition for certiorari. In its Brief in Opposition, Respondent United States has introduced new matter that on close examination further demonstrates that the decision below is contrary to this Court's precedents and raises questions of critical importance to all depositors and indorsers of U.S. Treasury checks and plaintiffs filing complaints in the Court of Federal Claims. Respondent has also mischaracterized the purport of the cases it cites and the record below. Basically, Respondent ignores the very essence and nature of the law of negotiable instruments and the chain of collection that is an integral part of the processing and payment of checks addressed by Part 240 of the Treasury regulations, 31 C.F.R. Part 240. It quixotically urges that a presenting bank that suffers no loss can prosecute a claim on a forged check against the United States, but a depositor who suffers the loss cannot.

As discussed further below, contrary to Respondent's assertions, (a) depositors and indorsers are recognized as essential participants in the commercial banking system and the Treasury regulations are not directed only at protecting the Treasury's rights, (b) a regulation need not confer a right to payment "expressly and with specificity" to be money-mandating, (c) there is a conflict between the circuits as to whether a bank's debit to an account holder which is triggered by the Treasury's debit to the bank is state action within the Due Process protection of the Fifth Amendment, and (d) it is not necessary to plead theories in a complaint, which may not be dismissed unless it is clear that no relief could be granted and in any event the theories in question here were argued in both courts below.

Respondent acknowledges that "the United States is subject to the general rules governing commercial paper," while arguing that the U.S. Court of Appeals for the Federal Circuit did not ignore the obligations of the U.S. Treasury under these rules, but simply found that Casa is not the

proper party to enforce those obligations. Brief for the United States in Opposition ("Resp. Br.") at 7. Indeed, the Federal Circuit recognized that a presenting bank could sue to enforce Treasury's obligations and recognized that such a claim would be governed by the federal common law established in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) ("*Clearfield Trust*"), as modified by the Treasury regulations. Appendix ("App.") at 7-8. Therefore, the Federal Circuit understood – and Respondent does not contest – that the United States has certain obligations as a commercial actor which must be enforceable, but held that Casa is not the proper enforcer.

What Respondent fails to acknowledge is that the effect of the barrier to suits by depositors erected by the Federal Circuit is contrary to the premises upon which *Clearfield Trust* is based. In *Clearfield Trust*, the government was able to recover because of the guaranty of endorsements and this Court considered, but rejected, the

defense of the intervening depositor.[1] In doing so, this Court, contrary to Respondent's contention, Resp. Br. at 9 n.2, recognized the distinction between a forged check, *i.e.*, a forged drawer's signature, and a forged indorsement. In such situations, as this Court recognized in *Clearfield Trust* and in *United States v. Chase Nat'l Bank*, 252 U.S. 485 (1920), the general rule followed in the world of commercial banking is the rule of *Price v. Neal*, 97 Eng. Rep. 871, 3 Burr. 1354 (1762), whereby after final payment, the liability for the loss is imposed on the drawee, in this case the Treasury. The Treasury regulations have not modified this rule, as demonstrated by Treasury's abortive attempts to supplant "Supreme Court precedent interpreting the common law in this area," *i.e.*, the rule of *Price v. Neal*. *See* 62 Fed. Reg.

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1 This Court in explaining the basis for its ruling wrote as follows:

> The fact that the drawee is the United States and the laches those of its employees are not material. *Cooke v. United States*, 91 U.S. 389, 398, 23 L.Ed. 237. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States v. National Exchange Bank*, 270 U.S. 527, 534, 46 S. Ct. 388, 389, 70 L.Ed. 717, 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.'

318 U.S. at 269. As this Court recently ruled in *Franconia Assocs. v. United States*, 536 U.S. 129, 122 S. Ct. 1993 (2002), "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals,'" *id.* at 2001 (citations omitted), and "limitations principles should generally apply to the Government 'in the same way' that they apply to private parties...," *id.* at 2003 (citations omitted)..

29314, 29315 (1997). Thus, the loss in this case should properly be laid at the doorstep of the Treasury.[2]

Respondent fails to acknowledge that this result, and the enforcement of the Treasury's obligations in the commercial marketplace in general, will go entirely unrealized under the ruling of the Federal Circuit. Under the law of negotiable instruments, a holder in due course is entitled to the protection of the rule of *Price v. Neal* and a drawee bank has no right to debit the presenting bank after final payment. In addition, as amici American Bankers Association, et al. point out, a presenting bank is and remains an agent of the depositor until first examination is complete and final payment is made. U.C.C. § 4-201(a). In

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2 The Federal Circuit's ruling has the effect of achieving the result that the Treasury sought in proposing amendments to its regulations which it has been loathe to institute in light of widespread opposition from the banking community.

Respondent asserts that these proposed amendments to Part 240 are irrelevant and do not recognize any right of a indorser to recover against the Treasury. Resp. Br. at 9 n.3. Contrary to Respondent's assertion, the Treasury has made it clear that its intent in proposing to amend the Part 240 regulations was "to supersede existing Federal common law regarding the apportionment of risk between Treasury and presenting banks with respect to certain materially defective Treasury checks, including counterfeits," 62 Fed. Reg. at 29314, and to, in effect, overturn the decision in *ABN AMRO Bank, N.V. v. United States*, 34 Fed. Cl. 126 (1995), which, the Treasury acknowledged, "held that, under Federal common law, Treasury generally cannot recover on a Treasury check bearing the forged signature of a drawer (i.e., disbursing officer). The Court further held that this result is not changed when a check also bears a forged indorsement on the back. In so ruling, the Court relied on the precedent of *United States v. Chase National Bank*, 252 U.S. 485 (1920), which, in turn, had relied on the English case of *Price v. Neal*, 97 Eng. Rep. 871, 3 Burr. 1354 (1762). The Court went on to hold that Treasury had failed to act in a manner which made evident an intent to modify by regulation the holdings of these cases.... In order to clarify this matter, we are reissuing the proposed rule. Treasury is cognizant of relevant United States Supreme Court precedent interpreting the common law in this area and, by this regulation, will remove any ambiguity regarding Treasury having supplanted that common law." 62 Fed. Reg. at 29315.

this case, Respondent has taken the position that final payment had not been made on the check in question in an obvious attempt to avoid the rule of *Price v. Neal*. *See* Resp. Br. at 11 n.4. If this were true, then Norwest must have remained Casa's agent with respect to the check. Furthermore, pursuant to the accepted rules of commercial banking, a depositor in Casa's position guarantees the indorsements on a negotiable instrument and, in the event of a breach of that guarantee, a presenting bank has a right to recover for the breach. U.C.C. § 4-207(a)(2) & (c). Thus, in circumstances such as occurred here, the depositor would have no recourse against the presenting bank, which was acting as the depositor's agent in any event, and in fact would be required to make the presenting bank whole. As a result, a presenting bank would have no standing to obtain redress from the drawee bank since the injured party is actually the depositor. Accordingly, if Treasury's obligations could only be enforced by the presenting bank, those obligations would never be enforced. At bottom, the issue is whether the United States, one of the largest single issuers of checks, the negotiation of which is of vital importance to the U.S. economy and to operation of the banking business throughout the world, may insulate itself from the fundamental responsibilities upon which the negotiability of checks is based. This Court's precedents make clear that the United States may not avoid such responsibilities.

Respondent's argument with respect to whether the Treasury regulations are money-mandating is similarly flawed. Respondent misstates the test for determining whether regulations are money-mandating, arguing that a regulation must confer a right to payment "expressly and with specificity." Resp. Br. at 9. Contrary to Respondent's assertion, this Court has consistently held that the test is whether a statute or regulation can fairly be interpreted as mandating compensation by the federal government for damage sustained and has made clear that the right to

recover damages may be either express or implied. *United States v. Mitchell*, 463 U.S. 206, 216-217 & n.16 (1983) ("*Mitchell*").[3]

Respondent also argues that the Treasury regulations at 31 C.F.R. Part 240 are intended only to protect the rights of the Treasury and do not even mention depositors, citing the ruling of the Court of Federal Claims below. Resp. Br. at 10. However, in holding that Norwest would have a claim against the United States for the delay in notification which occurred here, the Federal Circuit implicitly recognized that the Treasury regulations do in fact protect the rights of third parties. App. at 7-8. Treasury's repeated efforts to amend its regulations to address the ruling in *ABN Amro Bank N.V. v. United States*, 34 Fed. Cl. 126 (1995), likewise constitute a recognition that the regulations in their current form do not simply protect the rights of the Treasury but also protect the rights of depositors and indorsers who seek to enforce the obligations that the Part 240 regulations clearly impose on the Treasury.

Moreover, those rights must be viewed as extending to depositors such as Casa. A section of a statute or regulation must be read in the context of the larger scheme of which it is a part. *See, e.g., Meyer v. Holley*, 123 S. Ct. 824, 831 (2003) (interpreting phrase in HUD regulation in light of the regulation); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); *American Fed'n of Gov't Employees, Local 2782 v. Federal Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1985); *Lizut v. Dep't of Army*, 717 F.2d 1391, 1394 (Fed. Cir. 1983). The Part 240 regulations establish a system for the indorsement and payment of checks drawn on the Treasury that recognizes the participation of a number of actors who are integral to the

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3 Respondent relies heavily on *United States v. Testan*, 424 U.S. 392 (1976), for the proposition that a right to payment must be established expressly and with specificity. However, this Court confined that case to its result and stated that the language which the Respondent cites is dicta which should be disregarded. *Mitchell*, 463 U.S. at 216.

system, including depositors and indorsers. *See, e.g.*, 31 C.F.R. §§ 240.5, 240.6(a) and (d), 240.7, 240.10, 240.11(b), (d) and (f). *See also* 31 C.F.R. § 245.6; *Alnor Check Cashing v. Katz*, 11 F.3d 27, 30 (3d Cir. 1993) (Part 240 regulations "govern the relationship among the federal government, indorsers of government checks, and banks presenting government checks to the . . . Federal Reserve Bank for payment"). Moreover, as discussed above, the rights extended to presenting banks are of little consequence unless those same rights are extended to depositors because presenting banks may have no incentive or standing to enforce any such rights. Thus, the Treasury regulations must be viewed as being money-mandating as to Casa.

Respondent also takes issue with Casa's argument that the decision of the Federal Circuit exacerbates a conflict among the circuits that should be resolved by this Court.[4] Respondent argues that any conflict between the circuit court decisions cited by Casa in its opening brief is irrelevant to the Court's consideration of this case because the cited decisions do not involve the type of claims at issue here. Resp. Br. at 13. While *Breault v. Heckler*, 763 F.2d 62 (2d Cir. 1985), dealt with social security payments that had erroneously been made to a widow, the court identified the issue as whether the debiting of the widow's account by her bank after the Social Security Administration had recouped payment from the bank "is the result of state action *so as to fall within the ambit of the Fifth Amendment.*" *Id.* at 63 (emphasis added). Thus, the issue in *Breault* (as it is here) is whether the action of a bank can be imputed to the federal government for purposes of the protections of the Fifth

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4 *National Board of YMCA v. United States*, 395 U.S. 85 (1969), is irrelevant. It addresses the application of the "direct and substantial" test in the context of damage due to troops attempting to protect real property. Rather, the conflict identified by Casa concerns the radically different context of negotiable instruments and the processing of checks and the impact of the Treasury's action upon the participants in the chain of collection for purposes of the Fifth Amendment.

Amendment.[5] Accordingly, the conflict between these decisions that was identified by Casa is very much on point and should be resolved by this Court.

Finally, Respondent's arguments concerning the standard applied by the Federal Circuit in reviewing the CFC's grant of the Respondent's motion to dismiss is fraught with errors. For example, Respondent argues that a complaint that makes no mention of a claim based on an agency or subrogation theory fails to provide fair notice to the defendant, but the authority cited is at war with this contention. As this Court pointed out in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), the liberal pleading notice of Rule 8(a) of the Federal Rules of Civil Procedure "is the starting point of a simplified pleading system" and a court may not dismiss a complaint unless it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Moreover, Rule 8(f) provides that all pleadings shall be so construed as to do substantial justice. *Id.* at 513-14. This Court further noted that if a pleading fails to specify the allegations in a manner that provides sufficient notice, the defendant can move for a more definite statement under Rule 12(e). *Id.* at 514. Casa was not accorded the benefit of these liberal pleading rules and certainly did not "waive" them.

Respondent also argues that the Federal Circuit properly refused to consider Casa's argument that it is entitled to pursue the claims that Norwest had against the Treasury based on a theory of agency or subrogation, citing this Court's ruling that it will not ordinarily decide

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5 Respondent argues that *Breualt* - a procedural due process case - does not involve the types of claims at issue here. Resp. Br. at 13. Yet this case involves a claim for illegal exaction under the Due Process clause of the Fifth Amendment. Moreover, Respondent's attempted distinction means that when money is taken from bank accounts due to a Treasury debit to the bank, one who has obtained money by mistake - as Mrs. Breault had done - is entitled to protection under the Fifth Amendment, while one whose money has been wrongfully taken does not.

questions neither raised nor resolved below. Resp. Br. at 15. However, the Federal Circuit did not base its ruling on the fact that the issue had not been raised or resolved in front of the CFC; in fact, Casa had raised the issue in oral argument in response to specific questioning by that court. *See* Federal Circuit Joint Appendix at 77, 80-81, 83-85. Rather, the Federal Circuit based its determination on the fact that Casa had not pleaded an agency theory in its complaint, a determination that is inconsistent with the liberal pleading rules discussed above. Moreover, as far as this Court's consideration of the issue is concerned, this issue was extensively briefed before and resolved by the Federal Circuit. *See* Brief Of The Plaintiff-Appellant at 11-17, 27-28; Reply Brief Of Plaintiff-Appellant at 2-13, 14, 16, 22-24 Therefore, there is no bar to this Court's consideration of this pleading standards issue.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, the petition should be granted.

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Respectfully Submitted,

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